THE GENERAL STATUTES OF NORTH CAROLINA

1987 CUMULATIVE SUPPLEMENT

Annotated, under the Supervision of the Department of Justice, by the Editorial Staff of the Publishers

Under the Direction of
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Volume 2C, Part I

Chapters 63 to 89E

Annotated through 356 S.E.2d 26. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume.

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Preface

This Cumulative Supplement to Replacement Volume 2C, Part I contains the general laws of a permanent nature enacted by the General Assembly through the 1987 Regular Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the new law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1987 Regular Session affecting Chapters 63 through 89E of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 319, p. 464.
North Carolina Court of Appeals Reports through Volume 85, p. 173.
South Eastern Reporter 2nd Series through Volume 356, p. 26.
Federal Reporter 2nd Series through Volume 817, p. 761.
Federal Supplement through Volume 658, p. 304.
Federal Rules Decisions through Volume 115, p. 78.
Bankruptcy Reports through Volume 72, p. 618.
Supreme Court Reporter through Volume 107, p. 2210.
North Carolina Law Review through Volume 65, p. 847.
Wake Forest Law Review through Volume 22, p. 424.
Campbell Law Review through Volume 9, p. 206.
Duke Law Journal through 1987, p. 190.
North Carolina Central Law Journal through Volume 16, p. 222.
Opinions of the Attorney General.

User's Guide

In order to assist both the legal profession and the layman in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included herein. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See Volume 1A, Part I for the complete User's Guide.

The General Statutes of North Carolina
1987 Cumulative Supplement

VOLUME 2C, PART I

Chapter 63.

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Article 1.

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§ 63-1. Definitions; singular and plural.

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Cited in Davidson County v. City of High Point, — N.C. App. —, 354 S.E.2d 280 (1987).

Article 2.

State Regulation.

§ 63-20. Qualifications of operator; federal license.

CASE NOTES

Applicability of Federal Regulation Placing Responsibility on Pilot. — The federal regulation that the pilot in command of the aircraft shall be directly responsible for its operation and shall have final authority as to the operation of the aircraft is made applicable to all flights in North Carolina by state statute. No in-flight negligence of the pilot can be imputed to the passengers who chartered the plane. Nothing short of physical interference with the pilot's

operation of the plane would remove the pilot from actual control. Haley v. United States, 654 F. Supp. 481 (W.D.N.C. 1987).

ARTICLE 3.

Stealing, Tampering with, or Operating Aircraft While Intoxicated.

§ 63-26. Tampering with aircraft made crime.

Any person who shall, without the consent of the owner, go upon or enter, tamper with or in any way damage or injure any airplane or other aircraft, or any personal property under the control of or being used by any public or private airport or aircraft landing facility shall be guilty of a misdemeanor and shall be punished by the imposition of a fine not to exceed five thousand dollars ($5,000) or imprisonment of not more than two years, or both, and the showing of willful or malicious intent shall not be necessary to sustain a conviction hereunder. (1929, c. 90, s. 2; 1987, c. 818, s. 3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§ 63-26.1. Trespass upon airport property made a crime.

(a) It shall be unlawful for any person to trespass upon airport property. For purposes of this section "airport property" means property that is under the control of or is being used by any public or private airport or aircraft landing facility.

(b) A person commits the offense of trespass upon airport property if, without authorization, he enters or remains on airport property that is so enclosed or posted or secured as to demonstrate clearly an intent to keep out intruders. Violation of this section is a misdemeanor and upon conviction a person shall be punished by imprisonment for up to six months, a fine of up to two thousand five hundred dollars ($2,500), or both. (1987, c. 818, s. 4.)

Editor's Note. — Session Laws 1987, c. 818, s. 5 makes this section effective October 1, 1987.

§ 63-27. Operation of aircraft while impaired.

(a) Offense. — A person commits the offense of operation of an aircraft while impaired if he operates an aircraft, whether on the ground or in the air or on water, within this State:

(1) While under the influence of an impairing substance; or

(2) After having consumed sufficient alcohol that he has, at any relevant time after the operating of an aircraft, an alcohol concentration of 0.04 or more.

The relevant definitions contained in G.S. 20-4.01 shall apply to this section.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for operating an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant operated the aircraft within this State while subject to an impairing substance.

(d) Chemical Analysis. — Any person who operates an airplane or other aircraft, whether on the ground or in the air or on the water within the territorial limits of this State gives consent to chemical analysis if he is charged with the offense of operating an aircraft while impaired. The charging officer must designate the type of chemical analysis to be administered, and it may be administered when he has reasonable grounds to believe that the person charged has committed the specified crime. The chemical analysis shall be performed pursuant to the procedures established under Chapter 20 of the General Statutes applying to motor vehicle violations with the exception that if the person charged refuses to be tested, the charging officer shall, in writing, notify the local office of the Federal Aviation Administration of the individual's refusal. The results of any chemical tests administered pursuant to this section will be admissible into evidence at trial on the offense charged and a written report of the test results shall be made available to the local office of the Federal Aviation Administration.

(e) Punishment. — A person violating this section shall be guilty of a misdemeanor and shall be punished by imprisonment of not more than two years or a fine not to exceed one thousand dollars ($1,000) or both. Provided, however, for a second and all subsequent convictions of this section, a person shall be guilty of a Class J felony. (1929, c. 90, s. 3; 1953, c. 675, s. 8; 1987, c. 818, s. 1.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

§ 63-28. Infliction of serious bodily injury by operation of an aircraft while impaired.

(a) Offense. — A person commits the offense of infliction of serious bodily injury by operation of an aircraft while impaired if, while in violation of G.S. 63-27, he does serious bodily injury to another.

(b) Defense precluded. — The fact that a person charged with violating this section is or has been legally entitled to use alcohol or a drug is not a defense to a charge under this section.

(c) Pleading. — In any prosecution for infliction of serious bodily injury by operation of an aircraft while impaired, the pleading is sufficient if it states the time and place of the alleged offense in the usual form and charges that the defendant did serious bodily injury to another while operating an aircraft within this State while subject to an impairing substance.

(d) Punishment. — Violation of this section is a Class H felony. (1929, c. 90, s. 4; 1953, c. 675, s. 9; 1987, c. 818, s. 2.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote this section.

Article 9.

Changes in Special Use Airspaces.

§ 63-90. Public purpose declared.

It is the intent of the General Assembly that the legislative branch review and comment on all applications and actions of the Federal Aviation Administration concerning the creation of or changes in special use airspaces for aircraft operation over North Carolina. (1987, c. 494, s. 1.)

Editor's Note. — Session Laws 1987, c. 494, s. 2 makes this Article effective upon ratification and applicable to pending changes in ceilings. The act was ratified June 29, 1987.

§ 63-91. General Assembly review and approval.

The Division of Aviation of the Department of Transportation shall bring before the General Assembly or the Joint Legislative Commission on Governmental Operations all applications to the Federal Aviation Administration and all proposed rule changes by the Federal Aviation Administration for the creation of or changes in special use airspaces, including military operation areas and restricted areas for aircraft operation over North Carolina during the period for public comment. If the General Assembly is in session during that period, information on the pending application or rule change shall be presented to the standing Transportation Committees of the House of Representatives and the Senate. If the comment period occurs when the General Assembly is not in session then the Division of Aviation of the Department of Transportation shall bring the relevant information before the Joint Legislative Commission on Governmental Operations. The General Assembly or the Joint Legislative Commission on Governmental Operations will then review and comment on those applications. (1987, c. 494, s. 1.)

§ 63-92. Effect of General Assembly review.

(a) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is in the best interests of the citizens of this State, then the Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position on the pending application or rule change when it submits the State's official position on the pending application or rule change.

(b) If the General Assembly or the Joint Legislative Commission on Governmental Operations determines that the proposed change is not in the best interests of the citizens of this State, then the

Division of Aviation of the Department of Transportation shall notify the Federal Aviation Administration of the General Assembly's official position opposing the pending application or rule change when it submits the State's official position on the pending application or rule change. (1987, c. 494, s. 1.)

Chapter 64.

Editor's Note. — The legislation and annotations affecting Chapter 64 have been included in a recently published replacement chapter.

Chapter 65.

Cemeteries.

Article 8A.

Veterans Cemeteries.

§ 65-41. Land acquisition.

The State may accept land for the establishment of not more than three veterans cemeteries. (1987, c. 183, s. 1.)

Editor's Note. — Session Laws 1987, c. 183, s. 2 makes this Article effective upon ratification. The act was ratified May 14, 1987.

§ 65-42. Location of cemeteries.

These veterans cemeteries may be located in those regions of the State with a high concentration of veterans including the 3rd, 7th and 11th United States Congressional Districts. (1987, c. 183, s. 1.)

§§ 65-43 to 65-45: Reserved for future codification purposes.

Article 9.

North Carolina Cemetery Act.

§ 65-53. Powers.

In addition to other powers conferred by this Article, the Cemetery Commission shall have the following powers and duties:

(1) The administrator shall be appointed by the Governor upon recommendation of the Cemetery Commission. The compensation of the administrator and such other personnel as is necessary to operate the Commission is subject to the provisions of Chapter 126 of the General Statutes of North Carolina. The Commission is authorized and empowered to employ such staff, including legal counsel, as may be necessary.

(1943, c. 644, s. 17; 1971, c. 1149, s. 8; 1973, c. 732, s. 2; 1975, c. 768, s. 1; 1977, c. 686, ss. 4-6; 1979, c. 888, ss. 1-3; 1981 (Reg. Sess., 1982), c. 1153; 1987, c. 488, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, added the last sentence of subdivision (1).

§ 65-54. Annual budget of Commission; collection of funds.

The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from yearly fees and from any other sources provided in this Article. On or before July 1 of each year, each licensed cemetery will pay a license fee to be set by the Commission in an amount not to exceed three hundred dollars ($300.00) per year; and in addition, an inspection fee for each grave space, niche, mausoleum crypt deeded and preneed cemetery merchandise contract for vaults, belowground crypts, mausoleum crypts, and memorials to be set by the Commission each year in order to defray the expenses of the Commission as set forth in the budget. Such additional fee shall not exceed one dollar and fifty cents ($1.50) per grave space, niche, and mausoleum crypt deeded, and shall not exceed four dollars ($4.00) per item in each preneed cemetery merchandise contract for vaults, belowground crypts, mausoleum crypts and memorials. (1975, c. 768, s. 1; 1977, c. 686, s. 7; 1987, c. 488, s. 1.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, rewrote this section.

§ 65-55. License; cemetery company.

(c) Upon receipt of the application and filing fee of four hundred dollars ($400.00), the Commission shall cause an investigation to be made to establish the following criteria for approval of such application:

(1) The creation of a legal entity to conduct cemetery business, and the proposed financial structure.

(2) A perpetual care trust fund agreement, with an initial deposit of not less than thirty thousand dollars ($30,000) and with bank cashier's check or certified check attached for such amount and payable to such trustee, with said trust executed by applicant and accepted by the trustee, conditioned only upon whether the application is approved.

(3) A plat of the land to be used for a cemetery, showing county, city and/or township, and names of roads and access streets or ways.

(4) Designation by the legal entity wishing to establish a cemetery of a general manager who shall be a person of good moral character, having had no less than one year's experience in cemeteries.

(5) Development plans sufficient to insure the community that the cemetery will provide adequate cemetery services, and the property is suitable for use as a cemetery.

(1943, c. 644, s. 9; 1957, c. 529, s. 3; 1967, c. 1009, s. 9; 1975, c. 768, s. 1; 1977, c. 686, s. 8; 1987, c. 488, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "thirty thousand dollars ($30,000)" for "fifteen thousand dollars ($15,000)" in subdivision (c)(2).

§ 65-59. Application for a change of control; filing fee.

In any case where a person, a group of persons, or a corporation proposes to purchase or acquire control of an existing cemetery company either by purchasing the outstanding capital stock of any cemetery company, or the interest of the owner or owners, or otherwise act to effectively change the control of said cemetery company, such person shall first make application on [a] form supplied by the Commission for a certificate of approval of such proposed change of control of said cemetery company. The application shall contain the name and address of the proposed new owners and the said Commission shall issue said certificate of approval only after it has become satisfied that the proposed new owners are qualified by character, experience and financial responsibility to control and operate the said cemetery in a legal and proper manner, and that the interest of the public generally will not be jeopardized by the proposed change in ownership and management. Such application for a purchase or change of control must be completed and accompanied by an initial filing fee of one hundred dollars ($100.00) to cover examination provided in G.S. 65-53(2) if required, and if records are in order, certificate of approval shall be issued. (1975, c. 768, s. 1; 1987, c. 488, s. 4.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "or otherwise act to effectively change" for "and thereby to change" in the first sentence.

§ 65-63. Requirements for perpetual care fund.

No such cemetery shall hereafter cause or permit advertising of a perpetual care fund in connection with the sale or offer for sale of its property unless the amount deposited in said funds shall be equal to not less than thirty-five dollars ($35.00) per grave space, niche, or mausoleum crypt sold, this sum to be deposited in perpetual care fund as provided in G.S. 65-61 except as provided in G.S. 65-64. Nothing may prohibit an individual cemetery from requiring a perpetual care deposit for grave memorial markers to be deposited in the perpetual care fund so long as the same assessment is uniformly applied to all grave memorial markers installed in such cemetery. (1943, c. 644, s. 5; 1957, c. 529, s. 1; 1967, c. 1009, s. 3; 1971, c. 1149, s. 3; 1975, c. 768, s. 1; 1979, c. 888, s. 4; 1987, c. 488, s. 5.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, rewrote this section.

§ 65-64. Deposits to perpetual care fund.

(c) Each cemetery hereinafter established shall create a care and maintenance trust fund depositing therein an initial deposit of not less than thirty thousand dollars ($30,000) and submit proof thereof to the Commission prior to offering for sale any burial rights in grave spaces, niches or crypts.

(e) When the amount deposited in the perpetual care fund required by this Article of any cemetery heretofore or hereafter established shall amount to one hundred fifty thousand dollars ($150,000), anything in this Article to the contrary notwithstanding, the cemetery may make all deposits thereafter either into the original perpetual care trust fund or into a separate fund which shall be an irrevocable trust and designated as Perpetual Care Trust Fund "A" and invested by trustee as directed by the cemetery, but may not be invested in another cemetery, and such deposits shall be not less than thirty-five dollars ($35.00) per grave space, niche, or mausoleum crypt space.

(1943, c. 644, s. 10; 1957, c. 529, s. 4; 1967, c. 1009, s. 10; 1971, c. 1149, s. 5; 1975, c. 768, s. 1; 1977, c. 686, s. 14; 1979, c. 888, ss. 5, 6; 1987, c. 488, ss. 3, 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "thirty thousand dollars ($30,000)" for "fifteen thousand dollars ($15,000)" in subsection (c) and substituted "and such deposits shall be not less than thirty-five dollars ($35.00) per grave space, niche, or mausoleum crypt space" for "and said deposits shall be not less than twenty-five dollars ($25.00) per grave space and niche and forty-five dollars ($45.00) per mausoleum crypt space" at the end of subsection (e).

§ 65-66. Receipts from sale of personal property or services; trust account; penalties.

(m) Within 30 days following the execution of a contract for the sale of personal property or performance of services, a purchaser may cancel his contract by giving written notice to the seller. The seller may cancel the contract, upon default by purchaser, by giving written notice to the purchaser. Within 30 days of notice of cancellation, the cemetery company or other entity shall refund to purchaser the principal amount on deposit in the trust account for his benefit on any undelivered merchandise or services. This amount (no other obligations owed the purchaser by the seller) shall constitute the purchaser's entire entitlements under the contract. The seller may not terminate the contract without complying with this subsection. (1975, c. 768, s. 1; 1979, c. 888, s. 7; 1987, c. 488, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, substituted "Within 30 days following the execution of a contract for the sale of personal property or performance of services" for "At any time prior to delivery of personal property or performance of services" at the beginning of the first sentence of subsection (m).

Article 10.

Access to and Maintenance of Private Graves.

§ 65-74. Entering private property to maintain or visit a private grave with consent.

Any of the following persons may, with the consent of the landowner, enter the property of another to discover, restore, maintain, or visit a private grave:

(1) A descendant of the person whose remains are reasonably believed to be interred in the grave;

(2) A descendant's designee; or

(3) Any other person who was personally acquainted with or has a special personal interest in the deceased. (1987, c. 686, s. 1.)

Editor's Note. — Session Laws 1987, c. 686, s. 2 makes this Article effective October 1, 1987.

§ 65-75. Entering private property to maintain or visit a private grave without consent.

(a) If the consent of the landowner cannot be obtained, any person listed in G.S. 65-74(1), (2), or (3) may commence a special proceeding by petitioning the clerk of superior court of the county in which he has reasonable grounds to believe the deceased is buried, for an order allowing him to enter the property to discover, restore, maintain, or visit the grave. The petition shall be verified. This special proceeding shall be in accordance with the provisions of Article 33 of Chapter 1 of the General Statutes. The clerk shall

issue an order allowing the petitioner to enter the property if he finds that:

(1) There are reasonable grounds to believe that the grave is located on the property or that it is reasonably necessary to cross the landowner's property to reach the grave;

(2) The petitioner, or his designee, is a descendant of the deceased, or that the petitioner was personally acquainted with or had a special interest in the deceased; and

(3) The entry on the property would not unreasonably interfere with the enjoyment of the property by the landowner.

(b) The clerk's order may:

(1) Specify the dates and the daylight hours that the petitioner may enter and remain on the property;

(2) Grant to the petitioner the right to enter the landowner's property once a month after the time needed for initial restoration of the grave; or

(3) Specify a reasonable route from which the petitioner may not deviate in all entries and exits from the property. (1987, c. 686, s. 1.)

Chapter 66.

Commerce and Business.

Article 9B.

Motor Clubs and Associations.

§ 66-49.13. Powers of Commissioner.

The Commissioner shall have the same powers and authority for the purpose of conducting investigations and hearings under this Article as that vested in him by G.S. 58-9.2 and 58-9.7.

(1) To investigate possible violation of this Article and to report evidence thereof to the Attorney General who may recommend prosecution to the appropriate solicitor;

(2) To suspend or revoke any license issued under this Article upon a finding, after notice and opportunity for hearing, that the holder of said license has violated any of the provisions of this Article, or has failed to maintain the standards requisite to original licensing as indicated in G.S. 66-49.12 hereof;

(3) To require any licensee to cease doing business through any particular agent or representative upon a finding after notice and opportunity for hearing, that such agent or representative has intentionally made false or misleading statements concerning the motor club services offered by the motor club represented by him;

(4) To approve or disapprove the name, trademarks, emblems, and all forms which an applicant for license or licensee employs or proposes to employ in connection with its business. If such name, trademarks or emblems is distinctive and not likely to confuse or mislead the public as to the

nature or identity of the motor club using or proposing to use it, then it shall be approved, otherwise, the Commissioner may disapprove its use and effectuate such disapproval by the issuance of an appropriate order; and

(5) To make any rules or regulations necessary to enforce the provisions of this Article. (1963, c. 698; 1987, c. 864, s. 3(c).)

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, rewrote this section.

Article 11.

Government in Business.

§ 66-58. Sale of merchandise by governmental units.

OPINIONS OF ATTORNEY GENERAL

TACIT Program Not Violative of Section. — The TACIT Program, offered by North Carolina State University's Department of Urban Affairs to units of local government to educate employees with respect to selecting appropriate computer equipment, does not violate the provisions of § 66-58. See Opinion of Attorney General to Mr. George E. Tatum, Register of Deeds, Cumberland County, 55 N.C.A.G. 101 (1986).

Article 13.

Miscellaneous Provisions.

§ 66-67. Disposition by laundries and dry cleaning establishments of certain unclaimed clothing.

If any person shall fail to claim any garment, clothing, household article or other article delivered for laundering, cleaning or pressing to any laundry or dry cleaning establishment as defined in G.S. 105-85, or any dry cleaning establishment as defined in G.S. 105-74, for a period of 60 days after the surrender of such articles for processing, the laundry or dry cleaning establishment shall have the right to dispose of such garments, clothing, household articles or other articles by whatever means it may choose, without liability or responsibility to the owner. Provided, however, that before such laundry or dry cleaning establishment may claim the benefit of this section it shall at the time of receiving such garments, clothing, household articles or other articles, have a notice of dimensions of not less than eight and one-half by 11 inches, prominently displayed in a conspicuous place in the office, branch office or retail outlet where said clothes, garments or articles are received, if the same be received at an office, on which notice shall appear the words "NOT RESPONSIBLE FOR GOODS LEFT ON

HAND FOR MORE THAN 60 DAYS": Provided further, that any garment or clothing or other article of a value of more than five hundred dollars ($500.00) may not be disposed of for a period of one year after the surrender of such articles for processing, in which case such garments, clothing or other articles may be disposed of 30 days after a notice thereof has been sent by certified mail, with return receipt requested, to the last known address of the owner of such garment, clothing or other article; provided further, that the provisions of this section shall also be applicable with respect to the storage of garments, furs, rugs, clothing or other articles after the completion of the period for which storage was agreed to be provided. (1947, c. 975; 1953, c. 1054; 1967, c. 931; 1987, c. 158.)

Effect of Amendments. — The 1987 amendment, effective May 8, 1987, substituted "five hundred dollars ($500.00)" for "one hundred and fifty dollars ($150.00)," substituted "one year" for "two years," and substituted "sent by certified mail" for "sent by registered or certified mail," all in the last sentence.

§ 66-67.1. Disposal by repair businesses of certain unclaimed property.

(a) Disposal Authorized. — Notwithstanding the provisions of Article 1 of Chapter 44A of the General Statutes, a person who repairs, alters, treats, or improves personal property in the ordinary course of his business pursuant to an express or implied contract with an owner or legal possessor of the personal property may, upon compliance with the notice requirement of subsection (b), dispose of any personal property of a value of five hundred dollars ($500.00) or less, other than a motor vehicle, that has not been claimed by the owner or legal possessor for a period of sixty days or more after his receipt of written notice that the property is ready to be claimed.

(b) Notice Requirement. — The repair business shall, at the time the property is surrendered, have a written notice of dimensions of not less than eight and one-half by eleven inches prominently displayed in a conspicuous place in the office or shop where the property was surrendered containing the following message: "NOT RESPONSIBLE FOR GOODS LEFT ON HAND FOR MORE THAN 60 DAYS". When the property has been repaired or otherwise processed, the repair business shall notify the owner or legal possessor of the property, by certified mail with return receipt requested, that the property is ready to be claimed.

(c) Liability. — A person who disposes of property in accordance with this section is not liable for damages to the owner of the property disposed of.

(d) Definitions. — As used in this section, the terms "legal possessor" and "owner" have the meanings provided in G.S. 44A-1. (1987, c. 386.)

Editor's Note. — Session Laws 1987, c. 386, s. 2 makes this section effective July 1, 1987, and applicable to property surrendered on or after that date.

Article 14.

Business under Assumed Name Regulated.

§ 66-68. Certificate to be filed; contents; exemption of certain partnerships engaged in rendering professional services; withdrawal or transfer of assumed name.

(f) Any person, partnership, or corporation executing and filing a certificate of assumed name as required by this section may, upon ceasing to engage in business in this State under the assumed name, withdraw the assumed name or transfer the assumed name to any other person, partnership, or corporation by filing in the office of the register of deeds of the county in which the certificate of assumed name is filed a certificate of withdrawal or a certificate of transfer executed as provided in subsection (b) of this section and setting forth:

(1) The assumed name being withdrawn or transferred;
(2) The date of filing of the certificate of assumed name;
(3) The name and address of the owner or owners of the business;
(4) A statement that such owner or owners have ceased engaging in business under the assumed name;
(5) If the assumed name is to be withdrawn, the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the withdrawal if it is not to be effective upon the filing of the certificate of withdrawal; and
(6) If the assumed name is to be transferred, the name and address of the transferee or transferees, and the effective date (which shall be a date certain but not more than 20 days from the date of filing) of the transfer if it is not to be effective upon the filing of the certificate of transfer. This subsection does not relieve a transferee of the obligation to file a certificate of assumed name as required by this Article. (1913, c. 77, s. 1; C.S., s. 3288; 1951, c. 381, ss. 3, 7; 1967, c. 823, s. 28; 1977, c. 384; 1985, c. 264; 1987, c. 723, ss. 1, 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and not applicable to pending litigation, added "withdrawal or transfer of assumed name" in the catchline, and added subsection (f).

CASE NOTES

Delay in Substituting Correct Name Not Fatal. — Where plaintiffs sued and served the appropriate party, their delay in substituting the correct name of that party was not fatal. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

Sufficient Service on Corporate Agent. — Where at the time that plaintiffs instituted their action, corporation had not complied with this section, but was actively conducting business under an assumed name and holding itself out to the public and to its employees under

that name, and where service of process was accomplished upon a corporate agent who might have been expected to know that the assumed name was a name used by the corporation, corporation was adequately served with sufficient legal process under its assumed name, and the trial court had jurisdiction. Tyson v. L'eggs Prods., Inc., 84 N.C. App. 1, 351 S.E.2d 834 (1987).

Cited in Huggins v. Hallmark Enters., Inc., 84 N.C. App. 15, 351 S.E.2d 779 (1987).

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There is no authority for allowing a foreign limited partnership to operate under any more than one assumed name, and the assumed name under which it operates must be the one registered with the Secretary of State. See Opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, — N.C.A.G. — (June 25, 1987).

Domestic limited partnerships may not operate under assumed names in North Carolina. See Opinion of Attorney General to Mr. Clyde Smith, Deputy Secretary of State, — N.C.A.G. — (June 25, 1987).

§ 66-69. Index of certificates kept by register of deeds.

Each register of deeds of this State shall keep an index which will show alphabetically every assumed name with respect to which a certificate is hereafter so filed in his county. The index shall also contain notations of any certificates of withdrawal or certificates of transfer filed in the county. (1913, c. 77, s. 2; C.S., s. 3299; 1951, c. 381, ss. 4, 7; 1967, c. 823, s. 29; 1987, c. 723, s. 3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and not applicable to pending litigation, added the second sentence.

§ 66-71. Violation of Article a misdemeanor; civil penalty.

(a) Any person, partner or corporation failing to file the certificate as required by G.S. 66-68(a) or G.S. 66-68(c) —

(1) Shall be guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine of not more than fifty dollars ($50.00) or imprisonment for not more than 30 days, and

(2) Shall be liable in the amount of fifty dollars ($50.00) to any person demanding that such certificate be filed if he fails to file the certificate within seven days after such demand. Such penalty may be collected in a civil action therefor.

(1913, c. 77, s. 4; 1919, c. 2; C.S., s. 3291; 1951, c. 381, ss. 6, 7; 1987, c. 723, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, and not applicable to pending litigation, substituted "G.S. 66-68(a) or G.S. 66-68(c)" for "this Article" at the end of the introductory language of subsection (a).

Article 17.

Closing-Out Sales.

§ 66-77. License required; contents of applications; inventory required; fees; bond; extension of licenses; records; false statements.

(a) No person shall advertise or offer for sale a stock of goods, wares or merchandise under the description of closing-out sale, or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise, or a distress sale unless he shall have obtained a license to conduct such sale from the clerk of the city or town in which he proposes to conduct such a sale or from the officer designated by the Board of County Commissioners if the sale is conducted in an unincorporated area. The applicant for such a license shall make to such clerk an application therefor, in writing and under oath at least seven days prior to the opening date of sale, showing all the facts relating to the reasons and character of such sale, including the opening and terminating dates of the proposed sale, the opening and terminating dates of any previous distress sale or closing-out sale held by the applicant within that county during the preceding 12 months, a complete inventory of the goods, wares or merchandise actually on hand in the place whereat such sale is to be conducted, and all details necessary to locate exactly and identify fully the goods, wares or merchandise to be sold. Provided, the seller in a distress sale need not file an inventory.

(b) If such clerk shall be satisfied from said application that the proposed sale is of the character which the applicant desires to advertise and conduct, the clerk shall issue a license, upon the payment of a fee of fifty dollars ($50.00) therefor, together with a bond, payable to the city or town or county in the penal sum of five hundred dollars ($500.00), conditioned upon compliance with this Article, to the applicant authorizing him to advertise and conduct a sale of the particular kind mentioned in the application. The license fee provided for herein shall be good for a period of 30 days from its date, and if the applicant shall not complete said sale within said 30-day period then the applicant shall make application to such clerk for a license for a new permit, which shall be good for an additional period of 30 days, and shall pay therefor the sum of fifty dollars ($50.00), and a second extension period of 30 days may be similarly applied for and granted by the clerk upon payment of an additional fee of fifty dollars ($50.00) and upon the clerk being satisfied that the applicant is holding a bona fide sale of the kind contemplated by this Article and is acting in a bona fide manner; provided, however, that the clerk may not grant an extension period as provided in this subsection if (i) the applicant conducted a distress sale immediately preceding the current sale for which the extension is applied for and (ii) the period of the extension applied for, when added to the period of the preceding sale and the period of the current sale, will exceed 120 days. No additional bond shall be required in the event of one or more extensions as herein provided for. Any merchant who shall have been conducting a business in

the same location where the sale is to be held for a period of not less than one year, prior to the date of holding such sale, or any merchant who shall have been conducting a business in one location for such period but who shall, by reason of the building being untenantable or by reason of the fact that said merchant shall have no existing lease or ownership of the building and shall be forced to hold such sale at another location, shall be exempted from the payment of the fees and the filing of the bond herein provided for.

(c) Every city or town or county to whom application is made shall endorse upon such application the date of its filing, and shall preserve the same as a record of his office, and shall make an abstract of the facts set forth in such application, and shall indicate whether the license was granted or refused.

(d) Any person making a false statement in the application provided for in this section shall, upon conviction, be deemed guilty of perjury. (1957, c. 1058, s. 2; 1981, c. 633, ss. 2-4; 1987, c. 387, s. 1.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, inserted "the opening and terminating dates of any previous distress sale or closing-out sale held by the applicant within that county during the preceding 12 months" near the middle of the second sentence of subsection (a), and in subsection (b) divided the former first sentence into the present first and second sentences, deleted "provided, however, that" at the beginning of the present second sentence, substituted "and" for "and provided further" preceding "a second extension period of 30 days" near the middle of the second sentence, and added the proviso at the end of the second sentence.

§ 66-80. Continuation of sale or business beyond termination date.

No person shall conduct a closing-out sale or a sale of goods, wares or merchandise damaged by fire, smoke, water or otherwise or a distress sale beyond the termination date specified for such sale, except as otherwise provided for in subsection (b) of G.S. 66-77; nor shall any person, upon conclusion of such sale, continue that business which had been represented as closing out or going out of business under the same name, or under a different name, at the same location, or elsewhere in the same city or town where the inventory for such sale was filed for a period of 12 months; nor shall any person, upon conclusion of such sale, continue business contrary to the designation of such sale. As used in this section, the term "person" includes individuals, partnerships, corporations, and other business entities. If a business entity that is prohibited from continuing a business under this section reformulates itself as a new entity or as an individual, whether by sale, merger, acquisition, bankruptcy, dissolution, or any other transaction, for the purpose of continuing the business, the successor entity or individual shall be considered the same person as the original entity for the purpose of this section. If an individual who is prohibited from continuing a business under this section forms a new business entity to continue the business, that entity shall be considered the same person as the individual for the purpose of this section. (1957, c. 1058, s. 5; 1981, c. 633, s. 6; 1987, c. 387, s. 2.)

Effect of Amendments. — The 1987 amendment, effective July 1, 1987, inserted "for a period of 12 months" near the end of the first sentence, and added the last three sentences.

Article 19.

Business Opportunity Sales.

§ 66-94. Definition.

CASE NOTES

In order for the Business Opportunity Sales Act to apply there must be a sale or lease of products, equipment, supplies, or services, for the purpose of enabling the purchaser to start a business; in addition, the seller must make one of the four types of representations listed in this section to the purchaser. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Violation Predating Effective Date of Article. — Where plaintiff initially contracted with defendant in June, 1976, over one year before October 1, 1977, the effective date of the Business Opportunity Sales Act, and all further contracts between plaintiff and defendant enabled plaintiff to continue and/or expand his business as an independent contract grower, none of them being for the purpose of starting a business, any violation of the Business Opportunity Sales Act, assuming its applicability, occurred before the statute became operative. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Act Held Inapplicable. — Where the trial court found that no representations were made until after the sale was consummated and that the agreement was for sellers to be sales and purchase agents on a commission basis, based on these filings, the transaction did not come within the purview of the Business Opportunity Sales Act and plaintiffs were not required to comply with the provisions of the Act. Anchor Paper Corp. v. Anchor Converting Co., 79 N.C. App. 144, 338 S.E.2d 821, cert. denied, 317 N.C. 332, 346 S.E.2d 134 (1986).

§ 66-94.1. Responsible sellers exemption.

(a) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies or services where:

(1) The seller has not derived net income from such sales within the State during either of its two previous fiscal years, and does not intend to derive net income from such sales during its current fiscal year; and

(2) The primary commercial activity of the seller or its affiliate is substantially different from the sale of the goods or services to the purchaser, and the gross revenues received by the seller from all such sales during the current and each of the two previous fiscal years do not exceed ten percent (10%) of the total gross revenues from all operations for the same period of the seller and any other affiliated entity contractually obligated to compensate the purchaser for the purchaser's business activities arising from the sale; and

(3) The sale results in an improvement to realty owned or leased by the purchaser which enables the purchaser to receive goods on consignment from the seller or its affiliate. An "improvement to realty" occurs when a building or other structure is constructed or when significant improvements to an existing building or structure are made; and

(4) The seller has either a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000) or has obtained a surety bond from a surety company authorized to do business in this State in an amount equal to or greater than the gross revenues received from the sale or lease of products, equipment, supplies or services in this State during the preceding 12-month period which enabled the purchaser to start a business.

(b) The provisions of Article 19 shall not apply to the sale or lease of any products, equipment, supplies, or services where:

(1) The seller has a net worth on a consolidated basis, according to its most recent audited financial statement, of not less than five million dollars ($5,000,000); and

(2) The primary commercial activity of the seller is motor carrier transportation and the seller is subject to the jurisdiction of the Interstate Commerce Commission or any other federal agency that regulates motor carrier transportation.

(c) Any seller satisfying the requirements of subsections (a) or (b) of this section shall file with the Secretary of State two copies of a document signed under oath by the seller or one authorized to sign on behalf of the seller containing the following information:

(1) The name of the seller and whether the seller is doing business as an individual, partnership, or corporation;

(2) The principal business address of the seller;

(3) A brief description of the products, equipment, supplies, or services being sold or leased by the seller; and

(4) A statement which explains the manner in which each of the requirements of subsections (a) or (b) of this section are met. (1983, c. 421, s. 1; 1987, c. 325.)

Effect of Amendments. — The 1987 amendment, effective June 9, 1987, rewrote subsection (b) and added subsection (c).

§ 66-99. Contracts to be in writing; form; provisions.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Article 24.

Trade Secrets Protection Act.

§ 66-155. Burden of proof.

CASE NOTES

Cited in Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986).

Article 26.

Farm Machinery Franchises.

§ 66-180. Definitions.

Legal Periodicals. — For comment, "The North Carolina Farm Machinery Franchise Act: Its Provisions, Context and Contribution to the Law of Franchising," see 8 Campbell L. Rev. 289 (1986).

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Agreements Regulated by Article. — The use of the language "granted the right to sell or distribute goods or services" in the definition of "franchise agreement" in defining the scope of this Article evidences an intent to regulate only those agreements in which an ongoing franchise relationship exists between a supplier and a dealer. See Opinion of Attorney General to the Honorable H. Martin Lancaster, 55 N.C.A.G. 47 (1985).

"Franchise Agreement" Does Not Include Item-by-Item Sale Arrangement. — An arrangement whereby a business sells farm equipment and parts to various retailers on an item-by-item basis, with each sale constituting a completed and final transaction, and with no requirement that a retailer maintain an inventory of the equipment or parts or that a retailer continue to purchase equipment or parts from the business in the future, does not constitute a "franchise agreement" within the scope of this Article. See Opinion of Attorney General to the Honorable H. Martin Lancaster, 55 N.C.A.G. 47 (1985).

Chapter 67.

Dogs.

Article 2.

License Taxes on Dogs.

§ 67-12. Permitting dogs to run at large at night; penalty; liability for damage.

Local Modification. — Yancey County: 1985 (Reg. Sess., 1986), c. 897.

Article 5

Protection of Livestock and Poultry from Ranging Dogs.

§ 67-30. Appointment of animal control officers authorized; salary, etc.

Local Modification. — County of Rowan: 1985 (Reg. Sess., 1986), c. 872.

Chapter 69.

Fire Protection.

Article 2.

Fire Escapes.

§ 69-1. Fires investigated; reports; records.

Local Modification. — City of Kannapolis: 1987, c. 558, s. 19.

§§ 69-8 to 69-13: Repealed by Session Laws 1987, c. 864, s. 51, effective August 14, 1987.

Article 3A.

Rural Fire Protection Districts.

§ 69-25.1. Election to be held upon petition of voters.

Local Modification. — (As to Article 3A) Caldwell, Chatham, Lee, and Wayne: 1985, c. 502; 1985 (Reg. Sess., 1986), c. 940; 1987, c. 235; Robeson: 1987, c. 560.

§ 69-25.5. Methods of providing fire protection.

CASE NOTES

Contracting with Incorporated Nonprofit Volunteer Fire Department. — This section specifically allows county commissioners to contract with an incorporated nonprofit volunteer fire department to provide fire protection. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, — N.C. App. —, 355 S.E.2d 139 (1987).

§ 69-25.11. Changes in area of district.

After a fire protection district has been established under the provisions of this Article and fire protection commissioners have been appointed, changes in the area may be made as follows:

(5) The area of any fire protection district may be increased by including within the boundaries of the district any adjoining territory lying within the corporate limits of the city if the territory is not already included within a fire protection district, provided both the city governing body and the county commissioners of the county or counties in which the fire protection district is located all agree by resolution to such inclusion. (1955, c. 1270; 1959, c. 805, s. 5; 1965, cc. 625, 1101; 1987, c. 711, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective July 31, 1987, added subdivision (5).

CASE NOTES

Exclusive Means of Altering Established Boundaries. — After a district has been created, the only ways to alter the established boundaries are listed in this section. Knotville Volunteer Fire Dep't, Inc. v. Wilkes County, — N.C. App. —, 355 S.E.2d 139 (1987).

§ 69-25.15. When district or portion thereof annexed by municipality furnishing fire protection.

(c) When all or part of a fire protection district is annexed, and the effective date of the annexation is a date other than a date in the month of June, the amount of the fire protection district tax levied on property in the district for the fiscal year in which municipal taxes are prorated under G.S. 160A-58.10 shall be multiplied by the following fraction: the denominator shall be 12 and the numerator shall be the number of full calendar months remaining in the fiscal year following the day on which the annexation becomes effective. For each owner, the product of the multiplication is the prorated fire protection payment. The finance officer of the city shall obtain from the assessor or tax collector of the county where the annexed territory was located a list of the owners of property on which fire protection district taxes were levied in the territory being annexed, and the city shall, no later than 90 days after the effective date of the annexation, pay the amount of the prorated fire protection district payment to the owners of that property. Such payments shall come from any funds not otherwise restricted by law.

(1957, c. 1219; 1985, c. 707, ss. 1, 2; 1987, c. 45, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective April 3, 1987, substituted "assessor" for "tax supervisor" in the third sentence of subsection (c).

Article 4.

Hotels; Safety Provisions.

§§ 69-26 to 69-31: Repealed by Session Laws 1987, c. 864, s. 52, effective August 14, 1987.

§§ 69-35 to 69-37: Repealed by Session Laws 1987, c. 864, s. 52, effective August 14, 1987.

Article 5.

Authority and Liability of Firemen.

§ 69-39.1. Liability limited.

(b) A rural fire department or a fireman who belongs to the department shall not be liable for damages to persons or property alleged to have been sustained and alleged to have occurred by reason of an act or omission, either of the rural fire department or of the fireman at the scene of a reported fire, when that act or omission relates to the suppression of the reported fire or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard by the department or the fireman unless it is established that the damage occurred because of gross negligence, wanton conduct or intentional wrongdoing of the rural fire department or the fireman.

(1983, c. 520, s. 1; 1985, c. 611, s. 1; 1987, c. 146, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective May 7, 1987, inserted "or to the direction of traffic or enforcement of traffic laws or ordinances at the scene of or in connection with a fire, accident, or other hazard" in subsection (b).

Chapter 70.

Indian Antiquities, Archaeological Resources and Unmarked Human Skeletal Remains Protection.

Article 2.

Archaeological Resources Protection Act.

Article 2.

Archaeological Resources Protection Act.

§ 70-16. Civil penalties.

A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department of Administration, in consultation with the Department of Cultural Resources, against any person who violates the provisions of G.S. 70-15. In determining the amount of the penalty, the Department shall consider the extent of the harm caused by the violation and the cost of rectifying the damage. Any person assessed shall be notified of the assessment by registered or certified mail. The notice shall specify the reasons for the assessment. If the person assessed fails to pay the amount of the assessment to the Department within 30 days after receipt of notice, the Department may institute a civil action in the Superior Court of Wake County to recover the amount of the assessment.

The Department may use the assessed funds to rectify the damage to archaeological resources or to otherwise effectuate the purposes of this Article. (1981, c. 904, s. 2; 1987, c. 827, s. 215.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted the last sentence of the first paragraph, pertaining to the scope of judicial review.

Chapter 74.

Mines and Quarries.

Article 2A.

Mine Safety and Health Act.

§ 74-24.5. Modification of safety and health standards.

Upon petition by an operator, a representative of miners, or a miner, the Commissioner may modify the application of any safety and health standard to a mine if the Commissioner determines that an alternative method of protecting the miners will guarantee the same measure of protection afforded the miners by the standard, or will enhance the level of safety and health provided by that standard. Upon receipt of such petition the Commissioner shall give public notice thereof and give notice to the operator, the representative of miners, or the miner in the affected mine, as appropriate, and shall cause such investigation to be made as he deems appropriate. Such investigation shall provide an opportunity for a public hearing, at the request of such operator, representative of the miners, or miner to enable the operator, the representative of miners, or miner in such mine or any interested party to present information relating to the modification of such standard. The Commissioner shall issue a decision incorporating his findings of fact therein and send a copy thereof to the operator, the representative of the miners, or miner as appropriate. A record shall be kept of a public hearing held under this section. The decision of the Commissioner is considered a final agency decision for purposes of judicial review. (1975, c. 206, s. 5; 1987, c. 827, s. 258.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted the present last two sentences for the former last sentence.

§ 74-24.10. Administrative and judicial review of decisions on mine safety.

(a) An operator to whom a notice of order is issued under G.S. 74-24.8 and G.S. 74-24.9 may contest the notice or order by filing a petition for a contested case under G.S. 150B-23 within 30 days after receiving the notice or order. An operator who files a petition for a contested case shall send a copy of the petition to all affected miners or to their representative, if any, when the petition is filed. Judicial review of a decision by the Commissioner in a contested case is available under Article 4 of Chapter 150B of the General Statutes.

(b) A notice or order, except an order issued under G.S. 74-24.8 (a), shall be stayed while it is under administrative or judicial review. (1975, c. 206, s. 10; 1987, c. 827, s. 259.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

§ 74-24.11: Repealed by Session Laws 1987, c. 827, s. 260, effective August 13, 1987.

§ 74-24.15. Rights and duties of miners.

(c) Any miner or a representative of miners who believes that he has been discharged or otherwise discriminated against by any person in violation of this section may, within 30 days after such violation occurs, apply to the Commissioner for a review of such alleged discharge or discrimination. A copy of the application shall be sent to such person who shall be the respondent. Upon receipt of such application, the Commissioner shall cause such investigation to be made as he deems appropriate. Upon receiving the report of such investigation, the Commissioner shall make findings of fact. If he finds that such violation did occur, he shall issue a decision, incorporating an order therein, requiring the person committing such violation to take such affirmative action to abate the violation as the Commissioner deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner or representative of miners to his former position with back pay. If he finds that there was no such violation, he shall issue an order denying the application. Such order shall incorporate the Commissioner's findings therein. An order issued by the Commissioner under this subsection is subject to administrative and judicial review in accordance with Chapter 150B of the General Statutes. Enforcement of a final order or decision issued under this subsection shall be subject to the provisions of G.S. 74-24.12.

(1975, c. 206, s. 15; 1987, c. 827, s. 261.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted the former fourth, fifth, sixth, and seventh sentences of subsection (c), pertaining to hearings and rewrote the next-to-last sentence of subsection (c).

Article 7.

The Mining Act of 1971.

§ 74-51. Permits — Application, granting, conditions.

Any operator desiring to engage in mining shall make written application to the Department for a permit. Such application shall be upon a form furnished by the Department and shall fully state the information called for; in addition, the applicant may be required to furnish such other information as may be deemed necessary by the Department in order adequately to enforce this Article.

The application shall be accompanied by a reclamation plan which meets the requirements of G.S. 74-53. No permit shall be issued until such plan has been approved by the Department.

The application shall be accompanied by a signed agreement, in a form specified by the Department, that in the event a bond forfeiture is ordered pursuant to G.S. 74-59, the Department and its representatives and its contractors shall have the right to make whatever entries on the land and to take whatever actions may be necessary in order to carry out reclamation which the operator has failed to complete.

Before deciding whether to grant a new permit, the Department shall circulate copies of a notice of application for review and comment as it deems advisable. The Department shall grant or deny the permit requested as expeditiously as possible, but in no event later than 60 days after the application form and any relevant and material supplemental information reasonably required shall have been filed with the Department, or if a public hearing is held, within 30 days following the hearing and the filing of any relevant and material supplemental information reasonably required by the Department. Priority consideration shall be given to applicants who submit evidence that the mining proposed will be for the purpose of supplying materials to the Board of Transportation.

Upon its determination that significant public interest exists, the Department shall conduct a public hearing on any application for a new mining permit. Such hearing shall be held before the Department reaches a final decision on the application, and in making its determination, the Department shall give full consideration to all comments submitted at the public hearing. Such public hearing shall be held within 60 days of the filing of the application.

The Department may deny such permit upon finding:

(1) That any requirement of this Article or any rule promulgated hereunder will be violated by the proposed operation;

(2) That the operation will have unduly adverse effects on wildlife or fresh water, estuarine, or marine fisheries;

(3) That the operation will violate standards of air quality, surface water quality, or groundwater quality which have been promulgated by the Department of Natural Resources and Community Development;

(4) That the operation will constitute a substantial physical hazard to a neighboring dwelling house, school, church, hospital, commercial or industrial building, public road or other public property;

(5) That the operation will have a significantly adverse effect on the purposes of a publicly owned park, forest or recreation area;

(6) That previous experience with similar operations indicates a substantial possibility that the operation will result in substantial deposits of sediment in stream beds or lakes, landslides, or acid water pollution; or

(7) That the operator has not corrected all violations which he may have committed under any prior permit and which resulted in,

a. Revocation of his permit,

b. Forfeiture of part or all of his bond or other security,

c. Conviction of a misdemeanor under G.S. 74-64, or

d. Any other court order issued under G.S. 74-64.

In the absence of any such findings, a permit shall be granted.

Any permit issued shall be expressly conditioned upon compliance with all requirements of the approved reclamation plan for the operation and with such further reasonable and appropriate requirements and safeguards as may be deemed necessary by the Department to assure that the operation will comply fully with the requirements and objectives of this Article. Such conditions may, among others, include a requirement of visual screening, vegetative or otherwise, so as to screen the view of the operation from public highways, public parks, or residential areas, where the Department finds such screening to be feasible and desirable. Violation of any such conditions shall be treated as a violation of this Article and shall constitute a basis for suspension or revocation of the permit.

Any operator wishing any modification of the terms and conditions of his permit or of the approved reclamation plan shall submit a request for modification in accordance with the provisions of G.S. 74-52.

If the Department denies an application for a permit, it shall notify the operator in writing, stating the reasons for its denial and any modifications in the application which would make it acceptable. The operator may thereupon modify his application or file an appeal, as provided in G.S. 74-61, but no such appeal shall be taken more than 60 days after notice of disapproval has been mailed to him at the address shown on his application.

Upon approval of an application, the Department shall set the amount of the performance bond or other security which is to be required pursuant to G.S. 74-54. The operator shall have 60 days following the mailing of such notification in which to deposit the required bond or security with the Department. The operating permit shall not be issued until receipt of this deposit.

When one operator succeeds to the interest of another in any uncompleted mining operation, by virtue of a sale, lease, assignment, or otherwise, the Department may release the first operator

from the duties imposed upon him by this Article with reference to such operation and transfer the permit to the successor operator; provided, that both operators have complied with the requirements of this Article and that the successor operator assumes the duties of the first operator with reference to reclamation of the land and posts a suitable bond or other security. (1971, c. 545, s. 6; 1973, c. 507, s. 5; 1977, c. 771, s. 4; c. 845, s. 2; 1981, c. 787, ss. 2, 3; 1987, c. 827, c. 82.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "or regulation" following "rule" in subdivision (1).

§ 74-54. Bonds.

Each applicant for an operating permit, or for the renewal thereof, shall file with the Department following approval of his application and shall thereafter maintain in force a bond in favor of the State of North Carolina, executed by a surety approved by the Commissioner of Insurance, in the amount set forth below. The bond herein provided for must be continuous in nature and shall remain in force until cancelled by the surety. Cancellation by the surety shall be effectuated only upon 60 days written notice thereof to the Department and to the operator.

The applicant shall have the option of filing a separate bond for each operating permit or of filing a blanket bond covering all mining operations within the State for which he holds a permit. The amount of each bond shall be based upon the area of affected land to be reclaimed under the approved reclamation plan or plans to which it pertains, less any such area where reclamation has been completed and released from coverage by the Department, pursuant to G.S. 74-56, or based on such other criteria established by the Mining Commission. The Department shall set the amount of the required bond in all cases, based upon a schedule established by the Mining Commission.

The bond shall be conditioned upon the faithful performance of the requirements set forth in this Article and of the rules adopted pursuant thereto. Liability under the bond shall be maintained as long as reclamation is not completed in compliance with the approved reclamation plan unless released only upon written notification from the Department. Notification shall be given upon completion of compliance or acceptance by the Department of a substitute bond. In no event shall the liability of the surety exceed the amount of the surety bond required by this section.

In lieu of the surety bond required by this section, the operator may file with the Department a cash deposit, negotiable securities, a mortgage of real property acceptable to the Department, or an assignment of a savings account in a North Carolina bank on an assignment form prescribed by the Department.

If the license to do business in North Carolina of any surety upon a bond filed pursuant to this Article should be suspended or revoked, the operator shall, within 60 days after receiving notice thereof, substitute for such surety a good and sufficient corporate surety authorized to do business in this State. Upon failure of the operator to make such substitution, his permit shall automatically become void and of no effect. (1971, c. 545, s. 9; 1981, c. 787, s. 4; 1987, c. 827, s. 85.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "and regulations" following "rules" in the first sentence of the third paragraph.

§ 74-55. Reclamation report.

Within 30 days after completion or termination of mining on an area under permit or within 30 days after each anniversary of the issuance of the operating permit, whichever is earlier, or at such later date as may be provided by rules of the Department, and each year thereafter until reclamation is completed and approved, the operator shall file a report of activities completed during the preceding year on a form prescribed by the Department, which shall:

(1) Identify the mine, the operator and the permit number;
(2) State acreage disturbed by mining in the last 12-month period;
(3) State and describe amount and type of reclamation carried out in the last 12-month period;
(4) Estimate acreage to be newly disturbed by mining in the next 12-month period;
(5) Provide such maps as may be specifically requested by the Department. (1971, c. 545, s. 10; 1987, c. 827, s. 85.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "and regulations" following "rules" in the introductory language.

§ 74-56. Inspection and approval of reclamation; bond release or forfeiture.

Upon receipt of the operator's annual report or report of completion of reclamation and at any other reasonable time the Department may elect, the Department shall cause the permit area to be inspected to determine whether the operator has complied with the reclamation plan, the requirements of this Article, any rules promulgated hereunder, and the terms and conditions of his permit. Accredited representatives of the Department shall have the right at all reasonable times to enter upon the land subject to the permit for the purpose of making such inspection and investigation.

The operator shall proceed with reclamation as scheduled in the approved reclamation plan. Following its inspection, the Department shall give written notice to the operator of any deficiencies noted. The operator shall thereupon commence action within 30 days to rectify these deficiencies and shall diligently proceed until they have been corrected. The Department may extend performance periods referred to in this section and in G.S. 74-53 for delays clearly beyond the operator's control, but only in cases where the Department finds that the operator is making every reasonable effort to comply.

Upon completion of reclamation of an area of affected land, the operator shall notify the Department. The Department shall make an inspection of the area, and if it finds that reclamation has been properly completed, it shall notify the operator in writing and release him from further obligations regarding such affected land. At the same time it shall release all or the appropriate protion of any performance bond or other security which he has posted under G.S. 74-54.

If at any time the Department finds that reclamation of the permit area is not proceeding in accordance with the reclamation plan and that the operator has failed within 30 days after notice to commence corrective action, or if the Department finds that reclamation has not been properly completed in conformance with the reclamation plan within two years, or longer if authorized by the Department, after termination of mining on any segment of the permit area, it shall initiate forfeiture proceedings against the bond or other security filed by the operator under G.S. 74-59. In addition, such failure shall constitute grounds for suspension or revocation of the operator's permit, as provided in G.S. 74-58. (1971, c. 545, s. 11; 1987, c. 827, s. 85.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "and regulations" following "rules" in the first sentence of the first paragraph.

§ 74-58. Suspension or revocation of permit.

Whenever the Department shall have reason to believe that a violation of (i) this Article, (ii) any rules promulgated hereunder, or (iii) the terms and conditions of a permit, including the approved reclamation plan, has taken place, it shall serve written notice of such fact upon the operator, specifying the facts constituting such apparent violation and informing the operator of his right to a hearing at a stated time and place. The date for such hearing shall be not less than 30 nor more than 60 days after the date of the notice, unless the Department and the operator shall mutually agree on another date. The operator may appear at the hearing, either personally or through counsel, and present such evidence as he may desire in order to prove that no violation has taken place or exists. If the operator or his representative does not appear at the hearing, or if the Department following the hearing finds that there has been a violation, the Department may suspend the permit until such time as the violation is corrected or may revoke the permit where the violation appears to be willful.

The effective date of any such suspension or revocation shall be 30 days following the date of the decision. An appeal to the Mining Commission under G.S. 74-61 shall stay such effective date until the Commission's decision. A further appeal to superior court under G.S. 74-61 shall stay such effective date until the date of the superior court judgment. If the Department finds at the time of its initial decision that any delay in correcting a violation would result in imminent peril to life or danger to property or to the environment, it shall promptly initiate a proceeding for injunctive relief under G.S. 74-64 hereof and Rule 65 of the Rules of Civil Procedure. The pendency of any appeal from a suspension or revocation of a permit shall have no effect upon such action.

Any operator whose permit has been suspended or revoked shall be denied a new permit or a renewal of the old permit to engage in mining until he gives evidence satisfactory to the Department of his ability and intent to fully comply with the provisions of this Article, and rules promulgated hereunder, and the terms and conditions of his permit, including the approved reclamation plan, and that he has satisfactorily corrected all previous violations. (1971, c.

545, s. 13; 1973, c. 1262, s. 33; 1979, c. 252, s. 1; 1987, c. 827, s. 82A.)

Editor's Note. — The Rules of Civil Procedure, referred to in this section, are found in § 1A-1.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "and regulations" following "rules" in the first sentence of the first paragraph, substituted "G.S. 74-61" for "G.S. 74-62" in the third sentence of the second paragraph, and substituted "and rules" for "rules and regulations" in the last paragraph.

§ 74-61. Administrative and judicial review of decisions.

Any affected person may contest a decision of the Department to deny, suspend, modify, or revoke a permit or a reclamation plan, to refuse to release part or all of a bond or other security, or to assess a civil penalty by filing a petition for a contested case under G.S. 150B-23 within 60 days after the Department makes the decision. The Commission shall make the final decision in a contested case under this section. Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision of the Commission. (1971, c. 545, s. 16; 1973, c. 1262, s. 33; 1977, c. 771, s. 4; 1979, c. 252, s. 3; 1987, c. 827, s. 86.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

§ 74-62: Repealed by Session Laws 1987, c. 827, s. 83, effective August 13, 1987.

§ 74-63. Rules.

The Commission may adopt rules necessary to administer this Article. (1971, c. 545, s. 18; 1973, c. 1262, s. 33; c. 1331, s. 3; 1987, c. 827, s. 84.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

§ 74-64. Penalties for violations.

(a) Civil Penalties.

(1) a. A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department against any person who fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars ($5,000) per day may be assessed for each day the violation continues.

b. Any permitted operator who violates any of the provisions of this Article, any rules promulgated thereun-

der, or any of the terms and conditions of his mining permit shall be subject to a civil penalty of not more than one hundred dollars ($100.00). Each day of a continuing violation shall constitute a separate violation. Prior to the assessment of any such civil penalty, written notice of the violation shall be given. The notice shall describe the violation with reasonable particularity, shall specify a time period reasonably calculated to permit the violator to complete actions to correct the violation, and shall state that failure to correct the violation within that period may result in the assessment of a civil penalty.

c. In determining the amount of the penalty, the Department shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, whether the violation was committed willfully, and the prior record of the violator in complying or failing to comply with this Article.

(2) The Department shall determine the amount of the civil penalty to be assessed pursuant to G.S. 74-64(a)(1) and shall give notice to the operator of the assessment of the civil penalty pursuant to G.S. 74-60. Said notice shall set forth in detail the violation or violations for which the civil penalty has been assessed. The operator may appeal the assessment of any civil penalty assessed pursuant to this section in accordance with the procedures set forth in G.S. 74-61.

(3) If payment of any civil penalty assessed pursuant to this section is not received by the Department or equitable settlement reached within 30 days following notice to the operator of the assessment of the civil penalty, or within 30 days following the denial of any appeal by the operator pursuant to G.S. 74-61 and 74-62, the Department shall refer the matter to the Attorney General for the institution of a civil action in the name of the State in the superior court of the county in which the violation is alleged to have occurred to recover the amount of the penalty.

(4) All funds collected pursuant to this section shall be placed in the special fund created pursuant to G.S. 74-59 and shall be used to carry out the purposes of this Article.

(5) In addition to other remedies, the Department may request the Attorney General to institute any appropriate action or proceedings to prevent, restrain, correct or abate any violation of this Article or any rules promulgated hereunder.

(b) Criminal Penalties. — In addition to other penalties provided by this Article, any operator who engages in mining in willful violation of the provisions of this Article or of any rules promulgated hereunder or who willfully misrepresents any fact in any action taken pursuant to this Article or willfully gives false information in any application or report required by this Article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than one hundred dollars ($100.00) nor more than one thousand dollars ($1,000) for each offense. Each day of continued violation after written notification shall be considered a separate offense.

(1971, c. 545, s. 19; 1979, c. 252, s. 2; 1981, c. 787, ss. 7, 8; 1987, c. 246, s. 1; c. 827, s. 85.)

Effect of Amendments. — Session Laws 1987, c. 246, s. 1, effective June 2, 1987, added paragraph (a)(1)c.

Session Laws 1987, c. 827, s. 85, effective August 13, 1987, deleted "or regulations" following "rules" in the first sentence of subdivision (a)(1)b, deleted "and regulations" following "rules" in subdivision (a)(5), and deleted "and regulations" following "rules" in the first sentence of subsection (b).

Article 8.

Control of Exploration for Uranium in North Carolina.

§ 74-85. Administrative and judicial review of decisions.

Any affected person may contest a decision of the Department to approve, deny, suspend, or revoke a permit, to require additional abandonment work, to refuse to release part or all of a bond or other security, or to assess a civil penalty by filing a petition for a contested case under G.S. 150B-23 within 30 days after the Department makes the decision. The Commission shall make the final decision in a contested case under this section. Article 4 of Chapter 150B of the General Statutes governs judicial review of a decision of the Commission. (1983, c. 279, s. 1; 1987, c. 827, s. 87.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote this section.

§ 74-86. Rules.

(1983, c. 279, s. 1; 1987, c. 827, s. 88.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the catchline is set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "and regulations" following "Rules" in the catchline.

Chapter 74A.

Company Police.

Sec.
74A-2. Oath and powers of company police; exceptions as to railroad police.

§ 74A-2. Oath and powers of company police; exceptions as to railroad police.

(b) Such policemen, while in the performance of the duties of their employment, shall severally possess all the powers of municipal and county police officers to make arrests for both felonies and misdemeanors and to charge for infractions:

(1) Upon property owned by or in the possession and control of their respective employers; or

(2) Upon property owned by or in the possession and control of any person or persons who shall have contracted with their employer or employers to provide security for protective services for such property; or

(3) Upon any other premises while in hot pursuit of any person or persons for any offense committed upon property vested in subdivisions (1) and (2) above.

(1871-2, c. 138, s. 53; Code, s. 1990; Rev., s. 2607; 1907, c. 128, s. 2; c. 462; C.S., s. 3485; 1933, c. 134, s. 8; 1941, c. 97, s. 5; 1943, c. 676, s. 2; 1959, c. 124, s. 1; 1963, c. 1165, s. 2; 1965, c. 872; 1969, c. 844, s. 8; 1977, c. 148, s. 4; 1981, c. 884, s. 4; 1987, c. 469.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 24, 1987, added "and to charge for infractions" at the end of the introductory language of subsection (b).

Chapter 74C.

Private Protective Services.

Article 1.

Private Protective Services Board.

Article 1.

Private Protective Services Board.

§ 74C-1. Title.

CASE NOTES

Constitutionality. — Regulating an occupation which engages in many of the same activities as public police officers is clearly a legitimate purpose of state government. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

The classification in § 74C-3(b), which exempts from regulation under the Private Protective Services Act insurance adjusters, credit rating services, attorneys, company or railroad police, and holders of liens on personal property when engaging in repossession of that property, is reasonably related to the purposes of the Act, in that it requires the Private Protective Services Board to license only those individuals engaged in a covered occupation not regulated elsewhere. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

The purpose of the Private Protective Services Act is to regulate those professions which charge members of the public a fee for engaging in many activities which overlap the functions of the public police. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

§ 74C-3. Private protective services business defined.

(b) "Private protective services" shall not mean:

(1) Insurance adjusters legally employed as such and who engage in no other investigative activities unconnected with adjustment or claims against an insurance company;

(2) An officer or employee of the United States, this State, or any political subdivision of either while such officer or employee is engaged in the performance of his official duties within the course and scope of his employment with the United States, this State, or any political subdivision of either;

(3) A person engaged exclusively in the business of obtaining and furnishing information as to the financial rating or

credit worthiness of persons; and a person who provides consumer reports in connection with:

a. Credit transactions involving the consumer on whom the information is to be furnished and involving the extensions of credit to the consumer,
b. Information for employment purposes,
c. Information for the underwriting of insurance involving the consumer,
d. Information in connection with a determination of the consumer's eligibility for a license or other benefit granted by a governmental instrumentality required by law to consider an applicant's financial responsibility, or
e. A legitimate business need for the information in connection with a business transaction involving the consumer;

(4) An attorney at law licensed to practice in North Carolina while engaged in such practice and his agent, provided said agent is performing duties only in connection with his master's practice of law;

(5) The legal owner or lien holder, and his agents and employees, of personal property which has been sold in a transaction wherein a security interest in personal property has been created to secure the sales transaction, who engage in repossession of said personal property;

(6) Company police or railroad police as defined in Chapter 74A of the General Statutes of North Carolina;

(7) Repealed by Session Laws 1981, c. 807, s. 1;

(8) Employees of a licensee who are employed exclusively as undercover agents; provided that for purposes of this section, undercover agent means an individual hired by another person, firm, association, or corporation to perform a job in and/or for that person, firm, association, or corporation and, while performing such job, to act as an undercover operative, employee, or independent contractor of a licensee, but under the supervision of a licensee.

(9) A person engaged in an alarm systems business subject to the provisions of Chapter 74D of the General Statutes of North Carolina.

(10) A person who obtains or verifies information regarding applicants for employment, with the knowledge and consent of the applicant, and is (i) engaged in business as a private personnel service as defined in G.S. 95-47.1 or engaged in business as a private employer fee pay personnel service, (ii) engaged in the business of obtaining or verifying information regarding applicants for employment, or (iii) an employer with whom the applicant has applied for employment.

(11) A person who is engaged in the business of providing efficiency studies to employers regarding services to consumers.

(12) A consultant who analyzes, tests, or in any way applies his expertise to interpreting, evaluating, or analyzing facts or evidence submitted by another in order to determine the cause or effect of physical or psychological occurrences, and furnishes his opinion and findings to the requesting source

or to a designee of requestor. (1973, c. 528, s. 1; 1977, c. 481; 1979, c. 818, s. 2; 1981, c. 807, ss. 1-3; 1983, c. 259; c. 786, ss. 2, 3; c. 794, s. 1; 1987, c. 284; c. 657, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — Session Laws 1987, c. 284, effective June 4, 1987, added subdivisions (b)(10) and (b)(11).

Session Laws 1987, c. 657, s. 1, effective October 1, 1987, added subdivision (b)(12).

CASE NOTES

Constitutionality. — The classification in subsection (b) of this section, which exempts from regulation under the Private Protective Services Act insurance adjusters, credit rating services, attorneys, company or railroad police, and holders of liens on personal property when engaging in repossession of that property, is reasonably related to the purposes of the Act, in that it requires the Private Protective Services Board to license only those individuals engaged in a covered occupation not regulated elsewhere. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

Purpose of Exceptions in Subsection (b). — The exceptions in subsection (b) of this section are a recognition by the General Assembly that all those who could conceivably fit within the definitions of those occupations covered by the Act are not similarly situated. Those exceptions serve merely to exempt those occupations regulated elsewhere in state or federal law, often more extensively than the regulation of private investigators. Shipman v. North Carolina Private Protective Servs. Bd., 82 N.C. App. 441, 346 S.E.2d 295, cert. denied and appeal dismissed, 318 N.C. 509, 349 S.E.2d 866 (1986).

OPINIONS OF ATTORNEY GENERAL

Investigator of personal injury claims, etc., subject to license requirements. — A company which represents itself as being in the business of investigating, furnishing reports, and testifying in court concerning matters involving personal injury, workers' compensation claims, death claims, hospital bill audits, group claims, subrogation services, and surveillance services comes under the license requirements of this section. See Opinion of Attorney General to Mr. James F. Kirk, Administrator, N.C. Private Protective Services Board, — N.C.A.G. — (Feb. 26, 1987).

§ 74C-8. Applications for an issuance of license.

(c) A business entity other than a sole proprietorship shall not do business under this Chapter unless the business entity has in its employ a designated resident qualifying agent who meets the requirements for a license issued under this Chapter and who is, in fact, licensed under the provisions of this Chapter, unless otherwise approved by the Board. Provided however, that this approval shall not be given unless the licensee signs a statement agreeing to waive jurisdiction or unless the licensee agrees to appoint a resident agent for service of process by the Board. For the purposes of the Chapter a qualifying agent means an individual in a management position who is licensed under this Chapter and whose name and address have been registered with the Administrator. In the event that the qualifying agent upon whom the business entity relies in order to do business ceases to perform his duties as qualifying agent, the business entity shall notify the Administrator within 10 working days. The business entity must obtain a substitute

qualifying agent within 30 days after the original qualifying agent ceases to serve as qualifying agent unless the Board, in its discretion, extends this period, for good cause, for a period of time not to exceed three months. The certificate authorizing the business entity to engage in a private protective service business shall list the name of at least one designated qualifying agent.

(d) Upon receipt of an application, the Board shall cause a background investigation to be made during the course of which the applicant shall be required to show that he meets all the following requirements and qualifications hereby made prerequisite to obtaining a license:

(1) That he is at least 18 years of age;

(2) That he is of good moral character and temperate habits. The following shall be prima facie evidence that the applicant does not have good moral character or temperate habits: conviction by any local, State, federal, or military court of any crime involving the illegal use, carrying, or possession of a firearm; conviction of any crime involving the illegal use, possession, sale, manufacture, distribution, or transportation of a controlled substance, drug, narcotic, or alcoholic beverages; conviction of a crime involving felonious assault or an act of violence; conviction of a crime involving unlawful breaking and/or entering, burglary, larceny, any offense involving moral turpitude; or a history of addiction to alcohol or a narcotic drug; provided that, for purposes of this subsection, "conviction" means and includes the entry of a plea of guilty or a verdict rendered in open court by a judge and/or jury;

(3) For a private detective license, that he has had at least three years experience within the past five years in private investigative work, or in an investigative capacity as a member of any federal law enforcement agency, any State law enforcement agency, any municipal law enforcement department, or any county law enforcement or sheriff's department. The Board may provide by rule that post-secondary education is experience under the preceding sentence. Time spent teaching police science subjects at a post-secondary educational institution (such as a community college, college or university) shall toll the time for the minimum year requirements in the preceding two sentences. After administrative remedies have been exhausted, disputes with the Board arising under G.S. 74C-8(d)(3) may be carried directly to the General Court of Justice in the county where the complainant resides.

(4) That he has the necessary training, qualifications, and/or experience in order to determine the applicant's competency and fitness as the Board may determine by rule for all licenses to be issued by the Board.

(1973, c. 47, s. 2; c. 528, s. 1; 1975, c. 592, s. 1; 1977, c. 570, s. 2; 1979, c. 818, s. 2; 1983, c. 673, s. 3; c. 794, ss. 3, 11; 1985, c. 560; 1987, c. 657, ss. 2, 2.1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, rewrote subsection (c) and subdivision (d)(3).

§ 74C-9. Form of license; term; renewal; posting; branch offices; not assignable; late renewal fee.

(d) The operator or manager of any branch office shall be properly licensed or registered. The license shall be posted at all times in a conspicuous place in the branch office. This license shall be issued for a term of one year. Every business covered under the provisions of this Chapter shall file in writing with the Board the addresses of each of its branch offices, if any, within 10 working days after the establishment, closing, or changing of the location of any branch office.

(1973, c. 528, s. 1; c. 1428; 1975, c. 592, ss. 2-4; 1979, c. 818, s. 2; 1983, c. 67, s. 1; c. 794, s. 8; 1985, c. 597, ss. 1-7; 1987, c. 657, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subsection (d).

§ 74C-11. Registration of persons employed; temporary employment.

(a) All licensees, within 20 days of the beginning of employment of an employee who will be engaged in the providing of private protective services covered by this Chapter unless the Administrator, in his discretion, extends the time period, for good cause, shall furnish the Board with the following:

(1) Set(s) of classifiable fingerprints on standard F.B.I. applicant cards; recent photograph(s) of acceptable quality for identification; and

(2) Statements of any criminal records obtained from the appropriate authority in each area where the employee has resided within the immediately preceding 48 months.

(f) Notwithstanding the provisions of this section, a licensee may employ a person as an unarmed security guard for a period not to exceed 30 days in any given calendar year without registering that employee in accordance with this section; provided that the licensee submits to the Administrator a quarterly report, within 30 days after the end of the quarter in which the temporary employee worked, which provides the Administrator with the name, address, social security number, and dates of employment of such employee. (1979, c. 818, s. 2; 1983, c. 67, s. 2; 1985, c. 597, ss. 8, 9; 1987, c. 657, ss. 4, 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subsections (a) and (f).

§ 74C-12. Suspension or revocation of licenses; appeal.

(a) The Board may, after compliance with Chapter 150B of the General Statutes, suspend or revoke a license or registration issued under this Chapter if it is determined that the licensee or registrant has:

(1) Made any false statement or given any false information in connection with any application for a license or trainee permit or registration or for the renewal or reinstatement of a license or trainee permit or registration;
(2) Violated any provision of this Chapter;
(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;
(4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
(5) Impersonated or permitted or aided and abetted any other person to impersonate a law enforcement officer of the United States, this State, any other state, or any political subdivision of a state;
(6) Engaged in or permitted any employee to engage in a private protective services business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
(7) Willfully failed or refused to render to a client service or a report as agreed between the parties and for which compensation has been paid or tendered in accordance with the agreement of the parties;
(8) Knowingly made any false report to the employer or client for whom information is being obtained;
(9) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
(10) Knowingly violated or advised, encouraged, or assisted the violation of any court order or injunction in the course of business as a licensee;
(11) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
(12) Undertaken to give legal advice or counsel or to in any way falsely represent that he is representing any attorney or he is appearing or will appear as an attorney in any legal proceeding;
(13) Issued, delivered, or uttered any simulation of process of any nature which might lead a person or persons to believe that such simulation — written, printed, or typed — may be a summons, warrant, writ or court process, or any pleading in any court proceeding;
(14) Failed to make the required contribution to the Private Protective Services Recovery Fund or failed to maintain the certificate of liability insurance required by this Chapter;
(15) Violated the firearm provisions set forth in this Chapter;
(16) Committed any act prohibited under G.S. 74C-16;
(17) Failed to notify the Administrator by a business entity other than a sole proprietorship licensed pursuant to this Chapter of the cessation of employment of the business

entity's qualifying agent within the time set forth in this Chapter;

(18) Failed to obtain a substitute qualifying agent by a business entity within 30 days after its qualifying agent has ceased to serve as the business entity's qualifying agent;

(19) Been judged incompetent by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or committed to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.

(b) The revocation or suspension of a license or registration by the Board as provided in subsection (a) shall be in writing, signed by the Administrator of the Board stating the grounds upon which the Board decision is based. The aggrieved person shall have the right to appeal from this decision as provided in Chapter 150B of the General Statutes. (1979, c. 818, s. 2; 1981, c. 807, s. 6; 1987, c. 550, s. 20; c. 657, s. 6.)

Editor's Note. —

Section 122-36, referred to in subdivision (a)(19) of this section, was repealed by Session Laws 1985, c. 589, s. 1. See now § 122C-3(21).

Article 5A of Chapter 122, referred to in subdivision (a)(19) of this section, was repealed by Session Laws 1985, c. 589, s. 1. See now Chapter 122C.

Effect of Amendments. — Session Laws 1987, c. 550, s. 20, effective October 1, 1987, substituted "Chapter 35A or former Chapter 35" for "Chapter 35" in subdivision (a)(19).

Session Laws 1987, c. 657, s. 6, effective October 1, 1987, rewrote this section.

§ 74C-16. Prohibited acts.

(d) No law enforcement officers of the United States, this State, any other state, or any political subdivision of a state shall be licensed as a private detective or security guard and patrol business licensee under this Chapter; provided no law enforcement officer of the United States, this State, or any of its political subdivisions may use any motor vehicle owned or leased by a law enforcement agency in the course and scope of any private employment which is subject to regulation by the provisions of this Chapter; provided that nothing in this section shall be construed to prohibit the holder of a company police commission under Chapter 74A of the General Statutes from being licensed under this Chapter or being employed by a licensee under this Chapter.

(f) No sworn court official shall be licensed or registered under this Chapter. (1979, c. 818, s. 2; 1983, c. 794, s. 5; 1987, c. 657, ss. 7, 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, rewrote subsection (d) and added subsection (f).

Chapter 74D.

Alarm Systems.

Article 1.

Alarm Systems Licensing Act.

Article 1.

Alarm Systems Licensing Act.

§ 74D-1. Title.

OPINIONS OF ATTORNEY GENERAL

Licensing Required. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-2. Licenses required.

OPINIONS OF ATTORNEY GENERAL

Businesses Which Install and Service Retail Storefront Alarms. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed under this Chapter. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-3. Exemptions.

The provisions of this Chapter shall not apply to:

(3) Installation of an alarm system on property owned by or leased to the installer;

(4) An alarm monitoring company located in another state which does not conduct any business through a personal representative present in this State but which solicits and conducts business solely through interstate communication facilities such as telephone messages, earth satellite relay stations and the United States postal service; and

(5) A person or business providing alarm systems services to a State agency or local government if that person or business has been providing those services to the State agency or local government for more than five years prior to the effective date of this act, and the State agency or local government joins with the person or business in requesting the application of this exemption. (1983, c. 786, s. 1; 1987, c. 11.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective March 12, 1987, deleted "and" at the end of subdivision (3), inserted "and" at the end of subdivision (4), added subdivision (5), and made minor changes in punctuation.

OPINIONS OF ATTORNEY GENERAL

Businesses Which Install and Service Retail Storefront Alarms. — The Alarm Systems Licensing Act requires that businesses which install and service retail storefront alarms be licensed under this Chapter. See opinion of Attorney General to Mr. James F. Kirk, Administrator, Alarm Systems Licensing Board, 55 N.C.A.G. 89 (1986).

§ 74D-4. Alarm Systems Licensing Board established; members; terms; vacancies; compensation; officers; meetings.

(c) Each member shall be appointed for a term of three years and shall serve until a successor is installed. No member shall serve more than two complete consecutive terms. The initial appointments shall be made by October 1, 1983. By October 1, 1986, the General Assembly shall appoint upon the recommendation of the President of the Senate under G.S. 120-121 a successor to its licensed appointment who also shall be licensed under this Chapter and shall appoint upon the recommendation of the Speaker of the House of Representatives under G.S. 120-121 a successor to its public appointment who also shall be a public member. Every three years thereafter the recommendation of the Lieutenant Governor and of the Speaker of the House of Representatives with respect to the licensed and public status of the persons they recommend shall continue likewise to alternate.

(1983, c. 786, s. 1; 1985, c. 561, s. 4; 1985 (Reg. Sess., 1986), c. 1026, s. 18.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1985 (Reg. Sess., 1986) amendment, effective July 16, 1986, substituted "President of the Senate" for "Speaker of the House of Representatives" and substituted "Speaker of the House of Representatives" for "Lieutenant Governor" in the fourth sentence of subsection (c).

§ 74D-10. Suspension or revocation of licenses; appeal.

(a) The Board may, after notice and an opportunity for hearing, suspend or revoke a license issued under this Chapter if it is determined that the licensee has:

(1) Made any false statement or given any false information in connection with any application for a license or for the renewal or reinstatement of a license;
(2) Violated any provision of this Chapter;
(3) Violated any rule promulgated by the Board pursuant to the authority contained in this Chapter;

(4) Been convicted of any crime involving moral turpitude or any other crime involving violence or the illegal use, carrying, or possession of a dangerous weapon;
(5) Failed to correct business practices or procedures that have resulted in prior reprimands by the Board;
(6) Impersonated or permitted or aided and abetted any other person to impersonate a law-enforcement officer of the United States, this State, or any of its political subdivisions;
(7) Engaged in or permitted any employee to engage in any alarm systems business when not lawfully in possession of a valid license issued under the provisions of this Chapter;
(8) Committed an unlawful breaking or entering, assault, battery, or kidnapping;
(9) Committed any other act which is a ground for the denial of an application for a license under this Chapter;
(10) Failure to maintain the certificate of liability required by this chapter;
(11) Any judgment of incompetency by a court having jurisdiction under Chapter 35A or former Chapter 35 of the General Statutes or commitment to a mental health facility for treatment of mental illness, as defined in G.S. 122-36(d), by a court having jurisdiction under Article 5A of Chapter 122 of the General Statutes.

(1983, c. 786, s. 1; 1985, c. 561, s. 9; 1987, c. 550, s. 21.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. —

Section 122-36 referred to in subdivision (a)(11) of this section, was repealed by Session Laws 1985, c. 589, s. 1. See now § 122C-3(21).

Article 5A of Chapter 122, referred to in subdivision (a)(11) of this section, was repealed by Session Laws 1985, c. 589, s. 1. See now Chapter 122C.

Effect of Amendments. —

The 1987 amendment, effective October 1, 1987, substituted "Chapter 35A or former Chapter 35" for "Chapter 35" in subdivision (a)(11).

Chapter 75.

Monopolies, Trusts and Consumer Protection.

Article 1.

General Provisions.

§ 75-1. Combinations in restraint of trade illegal.

CASE NOTES

I. GENERAL CONSIDERATION.

Unfair or Deceptive Trade Practice Based on Conduct Proscribed by Chapter 95. — Although Chapter 95, relating to labor, is regulatory in nature, this fact does not prevent the finding of an unfair or deceptive trade practice based on the conduct proscribed by Chapter 95. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Contributory negligence is not a defense to a Chapter 75 violation, and thus the trial judge did not err in failing to submit that issue to jury considering an unfair or deceptive trade practices claim. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

A contract whereby plaintiff invested $75,000 and was to receive in exchange, stock in a company to be formed by defendant was not within the scope of Chapter 75. Ward v. Zabady, — N.C. App. —, 354 S.E.2d 369 (1987).

Cited in Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986); Newton v. Whitaker, 83 N.C. App. 112, 349 S.E.2d 333 (1986).

§ 75-1.1. Methods of competition, acts and practices regulated; legislative policy.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For article, "Unfair and Deceptive Legislation: The Case for Finding North Carolina General Statutes Section 75-1.1 Unconstitutionally Vague as Applied to an Alleged Breach of a Commercial Contract," see 8 Campbell L. Rev. 421 (1986).

For survey of North Carolina construction law, with particular reference to unfair or deceptive acts or practices, see 21 Wake Forest L. Rev. 633 (1986).

For article, "North Carolina's Cautious Approach Toward the Imposition of Extracontract Liability on Insurers for

Bad Faith," see 22 Wake Forest L. Rev. 957 (1986).

For note on arbitration and punitive damages, in light of Rodgers Builders, Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986), see 64 N.C.L. Rev. 1145 (1986).

For note, "Bad Faith Refusal to Pay First-Party Insurance Claims: A Growing Recognition of Extra-Contract Damages," see 64 N.C.L. Rev. 1421 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

Constitutionality in Application. — The language of this section provides adequate notice that conduct constituting fraud is prohibited. Therefore, this section was not unconstitutional as applied in case involving fraud in a distributor-dealer relationship. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Legislative Intent. —

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under this section, since it provided that any damages suffered by the victim are to be trebled. General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Purpose of the statute, etc. —

The more recent pronouncements from the North Carolina Supreme Court concerning the applicability of this section emphasize the consumer protection purpose of the statute. Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

This section is designed, in part, to address the very real local concern that North Carolina businesses not be victimized by unfair methods of competition. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

The purpose of this section is to provide a civil means to maintain ethical standards of dealings between persons engaged in business and the consuming public within this State, and it applies to dealings between buyers and sellers at all levels of commerce. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

The 1977 amendments to this section constituted, etc. —

The 1977 amendment to this section, which deleted the term "trade" from the phrase "trade or commerce" and rewrote subsection (b), clearly constituted a substantive revision intended to expand the potential liability for certain proscribed acts. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

This Section Is Applicable to Full Extent Permissible. — By deleting the geographic limitation from this section, the General Assembly made this statute available to the full extent permissible under conflicts of law principles and the Constitution. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

This section is intended to apply to extra-territorial conduct where such application is not constitutionally prohibited. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Incidental Interstate Effect Not Excessive. — When applied to concerted multi-state conduct resulting in injury to North Carolina residents, this section may have an incidental interstate effect, but that effect is not excessive in light of the local interests served and its minimal burden upon other states which recognize the common-law action for disparagement as applicable to the operative facts. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Application of this section and § 75-5(b)(3) to conduct occurring outside of North Carolina is not preempted by federal statute. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Extra-territorial Product Disparagement. — There is no constitutional prohibition against a private cause of action under this section or § 75-5(b)(3) for the extra-territorial conduct of product disparagement directed respectively toward a North Carolina competitor or the business in North Carolina of a competitor, North Carolina having a rational interest in each situation. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Relation Between This Section and § 75-5(b)(3). — Any act which is a violation of § 75-5(b)(3) would also be considered to be a violation of this section, since § 75-5(b)(3) simply sets out specific conduct which is considered to be illegal and an unfair competitive act. Unlike the language of this section, however, the statutory language of § 75-5(b)(3) explicitly delineates the conduct prohibited within the limitations of the statutory language. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Effect on Competition Not Required. — By its terms, this section requires that the proscribed unfair methods of competition and unfair or deceptive acts or practices be "in or affecting commerce." Nothing in the statute requires an effect on competition. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

An action for unfair or deceptive acts, etc. —

An action for unfair and deceptive trade practices is a distinct action separate from fraud, breach of contract, and breach of warranty. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

This section is separate and distinct from any contractual relationship between plaintiff and defendants. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

The provisions of the UCC are not exclusive and do not preclude an action for unfair and deceptive trade practices. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

This chapter is applicable to commercial transactions which are also regulated by the UCC. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Antitrust Matters. — This section is a comprehensive law designed to include within its reach the federal antitrust laws. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

The Petroleum Marketing Practices Act, 15 U.S.C. § 2806(a), did not preempt this section or § 25-1-102(3) or the common law duty of good faith dealing as they arose in litigation involving wrongful termination of a franchise. L.C. Williams Oil Co. v. Exxon Corp., 627 F. Supp. 864 (M.D.N.C. 1985).

The common law provides some guidance in unfair competition cases, but the Unfair Trade Practice Act was enacted in part because common law remedies had often proved ineffective. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Common Law Defenses Are Not Relevant. — An action for unfair deceptive acts or practices is sui generis. Therefore, traditional common law defenses such as contributory negligence or good faith are not relevant; what is relevant is the effect of the actor's conduct on the consuming public. Concrete Serv. Corp. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

When the same course of conduct supports claims for fraud and for an unfair or deceptive trade practice under this chapter, recovery can be had on either claim, but not on both. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

Actions may assert both violations under this section and fraud based on the same conduct or transaction, and plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both. It would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues and the trial court has determined whether to treble the compensatory damages found by the jury, and such election should be allowed in the judgment. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Under this section, intent of the defendant and good faith are irrelevant. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

Securities transactions are beyond the scope of this section. Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985).

The North Carolina Unfair Trade Practices Act does not apply to securities transactions. City Nat'l Bank v. American Commonwealth Fin. Corp., 801 F.2d 714 (4th Cir. 1986), cert. denied, — U.S. —, 107 S. Ct. 1301, 94 L. Ed. 2d 157 (1987).

A violation of either or both §§ 95-47.6(2) and (9) as a matter of law constitutes an unfair or deceptive trade

practice in violation of this section. Winston Realty Co. v. G.H.G., Inc. 314 N.C. 267, 331 S.E.2d 677 (1985).

Who Are Protected. — This section does not protect only individual consumers, but serves to protect businesspersons as well. Concrete Serv. Corp. v. Investors Group, Inc., 76 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Individual consumers are not the only ones protected and provided a remedy under this section and § 75-16. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Officer's Personal Liability for His Tortious Conduct. — A corporate official may be held personally liable for tortious conduct committed by him, though committed primarily for the benefit of the corporation. This is true in trademark infringement and unfair trade practices cases. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

Applied in Lasercomb Am., Inc. v. Holiday Steel Rule Die Corp., 656 F. Supp. 612 (M.D.N.C. 1987).

Cited in Childers v. Hayes, 77 N.C. App. 792, 336 S.E.2d 146 (1985); Davidson v. Volkswagenwerk, 78 N.C. App. 193, 336 S.E.2d 714 (1985); Uzzell v. Integon Life Ins. Corp., 78 N.C. App. 458, 337 S.E.2d 639 (1985); John Lemmon Films, Inc. v. Atlantic Releasing Corp., 617 F. Supp. 992 (W.D.N.C. 1985); Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986); Yadkin Valley Bank & Trust Co. v. Northwestern Bank, 80 N.C. App. 716, 343 S.E.2d 439 (1986); Jackson v. Hollowell Chevrolet Co., 81 N.C. App. 150, 343 S.E.2d 577 (1986); Joyce v. Cloverbrook Homes, Inc., 81 N.C. App. 270, 344 S.E.2d 58 (1986); Cherry, Bekaert & Holland v. Worsham, 81 N.C. App. 116, 344 S.E.2d 97 (1986); Northwestern Bank v. Roseman, 81 N.C. App. 228, 344 S.E.2d 120 (1986); Brooks v. Rogers, 82 N.C. App. 502, 346 S.E.2d 677 (1986); Tyson v. Ciba-Geigy Corp., 82 N.C. App. 626, 347 S.E.2d 473 (1986); Moore v. North Carolina Farm Bureau Mut. Ins. Co., 82 N.C. App. 616, 347 S.E.2d 489 (1986); Bailey v. LeBeau, 318 N.C. 411, 348 S.E.2d 524 (1986); Stonewall Ins. Co. v. Fortress Reinsurers Managers, Inc., 83 N.C. App. 263, 350 S.E.2d 131 (1986); Investors Title Ins. Co. v. Herzig, 83 N.C. App. 392, 350 S.E.2d 160 (1986); Austell v. Smith, 634 F. Supp. 326 (W.D.N.C. 1986); Tryco Trucking Co. v. Belk Stores Servs., Inc., 634 F. Supp. 1327 (W.D.N.C. 1986); Dowless v. Warren-Rupp Houdailles, Inc., 800 F.2d 1305 (4th Cir. 1986); Spear v. Daniel, — N.C. App. —, 352 S.E.2d 441 (1987); Hooper v. Liberty Mut. Ins. Co., — N.C. App. —, 353 S.E.2d 248 (1987).

II. TRADE OR COMMERCE.

The rental of commercial property, etc.—

The leasing of just one commercial lot satisfies the requirement of being in or affecting commerce. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

The leasing of a piece of real estate for use as a restaurant parking lot is a business activity. Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

Employer-Employee Relationships. —

In accord with the main volume. See American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987).

Subsection (b) of this section is not broad enough to encompass all forms of business activities, but was adopted to ensure that the original intent of this section, as set forth in subsection (b) as originally enacted, was effectuated. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82 (1986).

III. UNFAIR AND DECEPTIVE ACTS.

A. In General.

No precise definition, etc. —

In accord with main volume. See Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

"Unfair" and "Deceptive" Practices. — A practice is unfair if it is unethical or unscrupulous, and it is deceptive if it has a tendency to deceive. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

Determination of Unfairness of Conduct.—

In accord with 1st paragraph in the main volume. See General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Unfair competition is that which a court of equity would consider unfair. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918,

cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Proof of actual deception is not necessary; it is enough that the statements had the capacity to deceive. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Factors Determining Unfairness, etc. —

In order to succeed under this section, it is not necessary for the plaintiff to show fraud, bad faith, deliberate or knowing acts of deception, or actual deception; plaintiff must, nevertheless, show that the acts complained of possessed the tendency or capacity to mislead, or created the likelihood of deception. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985).

In accord with 1st paragraph in main volume. See Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

The existence of unfair acts and practices must be determined from the circumstances of each case. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

Intent and Good Faith, etc. —

It is not necessary to prove bad faith to show an unfair or deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Question of Law. — The question of whether conduct constitutes an unfair or deceptive act in violation of the statute is one of law for the court, and the jury has no role in the decision as to whether damages should be trebled for such conduct. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Good faith is not a defense to an alleged violation of this section. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986).

Exclusive dealing arrangements and territorial restrictions may constitute unfair trade practices. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Price discrimination among those similarly situated constitutes a clear violation of North Carolina's unfair trade practice laws. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985), finding no price discrimination to be shown in the case at issue.

Limiting the growth of supply sold to distributors, while not illegal per se, may be illegal if it is used in a discriminatory manner as a means to an improper end. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

While a "no growth" designation, used punitively by supplier against distributor to freeze his allocation, could have some effect on a distributor's inclinations toward expanding either its territory or its suppliers, plaintiff distributor had the burden of showing an ability to prove at trial the "substantial" effect on the market necessary for a violation of the antitrust laws incorporated into North Carolina's Unfair Trade Practices Act. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Vertical Restraints. — Normally when a supplier establishes territorial lines, it constitutes a vertical restraint of trade. Because there are legitimate and even beneficial policy reasons for vertical territorial restraints, they are not per se illegal, but instead are examined under a rule of reason analysis. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Horizontal Restraints. — Situation in which competitors at the same market level decide to divide up various territories in order to minimize competition constitutes a "horizontal" restraint, which is per se illegal, even if the supplier actually is the one to implement the territorial plan, if done at the horizontal competitors' insistence. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

B. Illustrative Cases.

Proof of fraud would necessarily, etc. —

In accord with the main volume. See La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986); Webb v. Triad Appraisal & Adjustment Serv., Inc., — N.C. App. —, 352 S.E.2d 859 (1987).

Proof of fraud necessarily constitutes a violation of the prohibition against unfair and deceptive acts. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Fraudulent Scheme. — Where plaintiff's evidence showed not just a

breach of promise, but a fraudulent scheme, i.e., a contract induced by defendant dealer's promise to allow rescission of the contract by plaintiff, which promise defendant never intended to keep, dealer's conduct clearly supported an award of punitive damages. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

The statement of an intention to perform an act, when no such intention exists, constitutes misrepresentation of the promisor's state of mind, an existing fact, and as such may furnish the basis for an action for fraud if the other elements of fraud are present, and that proof of fraud necessarily constitutes a violation of the statutory prohibition against unfair and deceptive acts. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Distributor-Dealer Relationship. — This section was applicable to distributor-dealer relationship between defendant and plaintiff, and plaintiff dealer had standing to sue distributor under § 75-16. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 464 (1986).

Evidence held sufficient to permit the court to find with a reasonable degree of certainty that dealer lost profits for the years 1982 through 1984 in the amount of $401,000.00, and that such loss was the direct and necessary result of distributor's wrongful conduct. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 464 (1986).

Conduct of residential subdivision developer vis-à-vis plaintiff-purchasers of a lot within the subdivision is within the scope of this section. Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 344 S.E.2d 68, cert. granted, 318 N.C. 284, 347 S.E.2d 465 (1986).

Projected Construction Completion Dates. — In light of common knowledge that projected completion dates in the construction industry are often missed for a variety of reasons and may be impossible or impractical to fulfill, and the capacity of consumers to contract with reference thereto, the representation of such dates as firm when in fact they are not, standing alone, does not rise to the level of immoral, unethical, oppressive, or unscrupulous conduct, or amount to an inequitable assertion of power or position. Opsahl v. Pinehurst Inc., 81 N.C. App. 56, 344 S.E.2d 68, cert. granted, 318 N.C. 284, 347 S.E.2d 465 (1986).

Purchase and Resale by Brokers. — Evidence that (1) defendant brokers were plaintiffs' agents in looking for a house to buy; (2) plaintiffs told defendants they wanted to buy a certain house; (3) defendants later took title to the house and deeded it to plaintiffs; and (4) defendants did not obtain plaintiffs' informed consent to defendants' purchase from the owners and defendants' sale to plaintiffs, was sufficient to support an unfair or deceptive practices claim, since the evidence also showed that the practice or act affected commerce. Spence v. Spaulding & Perkins, Ltd., 82 N.C. App. 665, 347 S.E.2d 864 (1986).

Sale of Restaurant. — Evidence held sufficient to support findings by the jury from which the trial court could conclude that plaintiff seldom engaged in trade practices incident to the sale of restaurant which were unfair or deceptive in violation of this section. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986).

Denial of Insurance Claim. — The record failed to reveal the existence of any facts which would create any genuine issue that the manner in which defendant insurer conducted its investigation, or its subsequent denial of plaintiffs' claim, was unethical, oppressive or deceptive in any way. Marshburn v. Associated Indem. Corp., — N.C. App. —, 353 S.E.2d 123 (1987).

Attorney's Communication Held Neither Unfair Nor Deceptive. — In view of the strong public policy favoring freedom of communication between parties and their attorneys with respect to anticipated or pending litigation, as a matter of law a communication from defendant's attorney to the attorney for plaintiff's employer, a party involved in the disputed claim, concerning the subject matter of the controversy was neither unfair nor deceptive. Harris v. NCNB Nat'l Bank, — N.C. App. —, 355 S.E.2d 838 (1987).

Damages Award Justified. — Defendant's contention that there was no likelihood of confusion between his and plaintiff's shirt products because of defendant's label affixed inside the back of the shirt's collar was without merit, where such label was not visible while the shirt was being worn and where the

symbol used by defendant on the breast of the shirt was substantially identical to the one used by defendant. Polo Fashions, Inc. v. Craftex, Inc., 816 F.2d 145 (4th Cir. 1987).

Violation Not Found. — Non-brokerage restrictions placed upon agents by defendant insurance company merely prevented them from using defendants' resources to promote and sell the products of competitors. The facts disclosed no acts or practices on the part of defendants which could be held to be inequitable, oppressive, offensive to public policy, or substantially injurious to consumers, so as to violate this section. Dull v. Mutual of Omaha Ins. Co., — N.C. App. —, 354 S.E.2d 752 (1987).

Plaintiff's allegations that lessee intentionally caused the burning of a building which he leased from plaintiff failed to state a claim for relief under this section, since the alleged acts of the lessee did not constitute unfair and deceptive trade practices within the intended purpose of the statute. Threatt v. Hiers, 76 N.C. App. 521, 333 S.E.2d 772 (1985), cert. denied, 315 N.C. 397, 338 S.E.2d 887.

The institution of a lawsuit may be the basis for an unfair trade practices claim if the lawsuit is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

The average consumer would not have understood the below-quoted statement, included in a letter written by an employee of an insurer in response to an inquiry by an agent of the insured as to the extent of the insured's coverage while he was in military service, to mean that the remaining exception to coverage, including an "air craft except," set out in the "accidental death rider" would no longer be applied: "However, in addition to the basic policy, this accidental death rider would also be payable should his death occur while in the Armed Forces but not as a result of an act of war." Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985), aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986).

Construction of Pond. — This section was inapplicable under the following circumstances: (1) agents for a landowner and a contractor made an oral agreement for the construction of a pond, under which the contractor would receive no funds until the job was complete, unless he experienced cash flow problems, in which case he would ask for an advance for work already performed; (2) after excavating the pond site, the contractor asked for $2,000 to complete repairs on equipment, which was so advanced; (3) no additional work was performed; and (4) the contractor testified that the payment was for work already performed, to which he believed he was entitled. Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985).

A misunderstanding between an insured and an insurance agent regarding collision insurance coverage for the insured did not constitute a deceptive representation in violation of this section. Cockman v. White, 76 N.C. App. 387, 333 S.E.2d 54 (1985).

Actions Intended to Deceive Creditors into Extending Credit. — Trial court's conclusion that defendant engaged in actions intended to deceive creditors into extending credit to an individual who was not creditworthy and that these practices were forbidden by this section was amply supported by the findings of fact and the evidence. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Debt Collection. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in Article 2 of this Chapter, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of this section. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

A violation of § 58-54.4 as a matter of law constitutes an unfair or deceptive trade practice in violation of this section. Pearce v. American Defender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986).

Where plaintiff represented to the State that he had a certain supplier when in fact he was purchasing a large part of his fuel supply from other suppliers at a lower price than the posted price of that supplier, and the State relied on this representation in paying for fuel, there was a misrepresentation upon which the State relied which constituted an unfair and deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert.

denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under this section. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Conduct Not Amounting to Unfair Trade Practice. —

While a territorial restraint at least conceivably could be implied from economic factors, it could not be implied from market factors of plaintiff's own creation. Thus, where additional expenses which plaintiff distributor faced were caused by his decision to expand into an area in which he would not have access to a nearby supply terminal, and where even if supplier would have preferred that distributor stayed within his original territorial confines there was no evidence that it retaliated against him for not doing so, summary judgment for supplier was appropriate on distributor's Unfair Trade Practices claim. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Claim Not Cognizable under Virginia Law. — In action in which defendants argued that plaintiff committed an unfair trade practice by representing to defendants that they had a buyer who would pay $150,000 for plane upon delivery to Norfolk, Virginia, where the plane was sold in Richmond, Virginia for the sum of $55,000, not $150,000, the last act giving rise to the defendants' claim under this section occurred in Virginia, and the substantive law of Virginia would apply to defendants' counterclaim. Moreover, as a statutory basis for defendants' injury could not be found in Virginia law, defendants' claim would fail. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

IV. PLEADING AND PRACTICE.

Under this section the only question of fact is whether defendant did what was alleged; the words "unfair" and "deceptive" need never be mentioned to the jury. L.C. Williams Oil Co. v. Exxon, 625 F. Supp. 477 (M.D.N.C. 1985).

Jury Decides Facts. —

In cases under this section and § 75-16 the jury finds facts, and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated this section. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

In cases under § 75-16 and this section, it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986); Medina v. Town & Country Ford, Inc., — N.C. App. —, 355 S.E.2d 831 (1987).

And Court Determines Whether Practice Violates Section. —

In accord with 1st paragraph in main volume. See Pearce v. American Defender Life Ins. Co., 74 N.C. App. 620, 330 S.E.2d 9, cert. granted, 314 N.C. 542, 335 S.E.2d 20 (1985), aff'd in part and rev'd in part, 316 N.C. 461, 343 S.E.2d 174 (1986); General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Error Rendered Harmless by Court's Independent Determination. — Court's error in submitting to the jury the question of law as to whether defendant's conduct violated this section was cured or rendered harmless and nonprejudicial by the court's independent determination that defendant's acts constituted unfair and deceptive trade practices. Medina v. Town & Country Ford, Inc., — N.C. App. —, 355 S.E.2d 831 (1987).

Class Actions Allowed to Enforce Section. — When the General Assembly has wished to prevent class actions to enforce statutory claims for relief where the relief sought was personal and penal in nature, it has said so expressly and unequivocally. The failure of the General Assembly to expressly prohibit class actions to enforce this statute convinces the Supreme Court that it intended to allow them for such purposes. Crow v. Citicorp Acceptance Co., — N.C. —, 354 S.E.2d 459 (1987).

Propriety of Arbitration. — An unfair and deceptive practices claim pursuant to this section is proper for arbitration. Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d

726 (1985), cert. denied, 315 N.C. 590, 341 S.E.2d 29 (1986).

Question of Law. —

In accord with main volume. See L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

In action brought under this section, while the trial judge erred in submitting the issues of whether defendant's conduct was in commerce or affected commerce to the jury, because it is a part of the court's finding that the acts or conduct proven do or do not constitute an unfair or deceptive act within the meaning of this section, the error was harmless. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986).

While a court generally determines whether a practice is an unfair or deceptive act or practice based on the jury's findings, if the facts are not disputed the court should determine whether the defendant's conduct constitutes an unfair trade practice. L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

Burden of Proving Exemption. — Any party claiming to be exempt from the provisions of this section has the burden of proof with respect to such claim. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 464 (1986).

Erroneous Interpretation of Law Not Unfair Act. — To assert in good faith a claim predicated on an erroneous interpretation of the law is not an unfair act proscribed by this section, as the remedy therefor lies in the law itself, such that such an erroneous view will not prevail. Branch Banking & Trust Co. v. Columbian Peanut Co., 649 F. Supp. 1116 (E.D.N.C. 1986).

Inapplicable to Breach of Contract. — A breach of contract, even if intentional, does not fall within the purview of this section. Pappas v. NCNB Nat'l Bank, 653 F. Supp. 699 (M.D.N.C. 1987).

What Law Governs. — The law of the State where the last act occurred giving rise to defendant's injury governs defendant's action under this section. United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986).

Trebling of Damages. — Damages assessed pursuant to this section are trebled automatically. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Punitive Damages. — Because this section is in derogation of the common law causes of action for unfair or deceptive trade practices and § 75-16 imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

§ 75-2. Any restraint in violation of common law included.

Stated in Keith v. Day, 81 N.C. App. 185, 343 S.E.2d 562 (1986).

Cited in Cooper v. Forsyth County Hosp. Auth., 789 F.2d 278 (4th Cir. 1986).

§ 75-4. Contracts to be in writing.

CASE NOTES

Cited in Sharpe v. Park Newspapers of Lumberton, Inc., 78 N.C. App. 275, 337 S.E.2d 174 (1985); Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

§ 75-5. Particular acts prohibited.

CASE NOTES

I. GENERAL CONSIDERATION.

Charging Wholesale Prices While Fixing Retail Prices. — Evidence presented by plaintiff, to the effect that defendant wholesaler was charging its wholesale prices to plaintiff and at the same time setting plaintiff's retail prices, thus putting plaintiff at a competitive disadvantage, when viewed in the light most favorable to plaintiff, was sufficient to establish per se violations of both subdivisions (b)(2) and (b)(7) of this section. Baynard v. Service Distrib. Co., 78 N.C. App. 796, 338 S.E.2d 622 (1986).

Cited in L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985).

V. DESTROYING OR INJURING COMPETITION IN ORDER TO FIX PRICES.

Relation of Subdivision (b)(3) and § 75-1.1. — Any act which is a violation of subdivision (b)(3) of this section would also be considered to be a violation of § 75-1.1, since subdivision (b)(3) simply sets out specific conduct which is considered to be illegal and an unfair competitive act. Unlike the language of § 75-1.1, however, the statutory language of subdivision (b)(3) explicitly delineates the conduct prohibited within the limitations of the statutory language. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Application of Subdivision (b)(3) to Extraterritorial Conduct. — The thrust of subdivision (b)(3) of this section is the protection of business activity within the State. This provision does not preclude the application of the statute to extraterritorial conduct affecting in-state commercial activity, nor is such application constitutionally prohibited or preempted by federal law. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

There is no constitutional prohibition against a private cause of action under § 75-1.1 or subdivision (b)(3) of this section for the extraterritorial conduct of product disparagement directed respectively toward a North Carolina competitor or the business in North Carolina of a competitor, North Carolina having a rational interest in each situation. American Rockwool, Inc. v. Owens-Corning Fiberglas, 640 F. Supp. 1411 (E.D.N.C. 1986).

Destruction of Business in this State of a National Concern. — Subdivision (b)(3) of this section makes unlawful the destruction or attempted destruction of the business, i.e., the commercial activity, within North Carolina of a competitor or business rival, with the purpose of attempting to fix the price of goods when the competition is removed. In other words, it would be unlawful to attempt to destroy the business in North Carolina of a national concern, as well as a local concern unaffected by out-of-state conduct or without out-of-state contacts. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Subdivision (b)(3) of this section does not require a showing of adverse impact upon competition in the relevant market. American Rockwool, Inc. v. Owens-Corning Fiberglass Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Conduct Not Covered by Subdivision (b)(3). — Defendant's conduct, involving disparagement and false advertising, was not covered by subdivision (b)(3) of this section. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

§ 75-9. Duty of Attorney General to investigate.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 75-15. Actions prosecuted by Attorney General.

CASE NOTES

Quoted in State v. Felts, 79 N.C. App. 205, 339 S.E.2d 99 (1986).

§ 75-15.1. Restoration of property and cancellation of contract.

Legal Periodicals. — For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

§ 75-16. Civil action by person injured; treble damages.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

For article discussing pendent claims for damages in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For survey of North Carolina construction law, with particular reference to unfair or deceptive acts or practices, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

Application of the treble damage penalty provided by this section to extraterritorial conduct violates the Commerce Clause, and is precluded thereby. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Legislative Intent. —

The legislature's intent in enacting this section was to create a new, private cause of action for aggrieved consumers, since traditional common-law remedies were often deficient. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

The North Carolina Legislature must have intended that substantial aggravating circumstances be present before any practice is deemed unfair under § 75-1.1, since it provided that any damages suffered by the victim are to be trebled. General United Co. v. American Honda Motor Co., 618 F. Supp. 1452 (W.D.N.C. 1985).

Purpose. — The purpose of the statutory provisions for treble money damages and attorney's fees in this section and § 75-16.1 was to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

Who Are Protected. — Individual consumers are not the only ones protected and provided a remedy under § 75-1.1 and this section. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Standing of Dealer to Sue Distributor. — Section 75-1.1 was applicable to the distributor-dealer relationship between defendant and plaintiff, and

plaintiff dealer had standing to sue distributor under this section. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Standard of Proximate Cause. — Under this section, the North Carolina courts apply the standard of proximate cause articulated in federal antitrust cases. American Rockwool, Inc. v. Owens-Corning Fiberglas Corp., 640 F. Supp. 1411 (E.D.N.C. 1986).

Proof of fraud would necessarily constitute an unfair or deceptive act or practice; however, the converse is not always true. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986).

Determination of Facts and Law. — In cases under § 75-1.1 and this section, it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce. La Notte, Inc. v. New Way Gourmet, Inc., 83 N.C. App. 480, 350 S.E.2d 889 (1986).

The State is not a person, firm or corporation that can be sued under this section. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

But the State as Consumer Can Take Advantage of this Section. — There is no reason why the State as a consumer cannot take advantage of this section if it is the victim of an unfair or deceptive trade practice. F. Ray Moore Oil Co. v. State, 80 N.C. App. 139, 341 S.E.2d 371, cert. denied, 317 N.C. 333, 346 S.E.2d 139 (1986).

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trademark for the licensee's use. Any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

Damages assessed pursuant to § 75-1.1 are trebled automatically. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Punitive Damages, etc. —

Because § 75-1.1 is in derogation of the common law causes of action for unfair or deceptive trade practices and this section imposes a penalty, strict construction is in order. Thus, absent explicit legislative inclusion, punitive damages should be excluded. Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918, cert. denied, 316 N.C. 378, 342 S.E.2d 896 (1986).

Calculation of Treble Damages. — Trial court did not err in not deducting the amount of its recovery from the damages awarded to plaintiff prior to trebling plaintiff's damages, as offsetting plaintiff's damages by the amount of defendant's recovery prior to trebling the damages would amount to a triple recovery for defendant and would frustrate the punitive function of the treble damage provision. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Election Between Punitive Damages and Treble Damages. — Actions may assert both § 75-1.1 violations and fraud based on the same conduct or transaction, and plaintiffs in such actions may receive punitive damages or be awarded treble damages, but may not have both. It would be manifestly unfair to require plaintiffs in such cases to elect before the jury has answered the issues and the trial court has determined whether to treble the compensatory damages found by the jury, and such election should be allowed in the judgment. Mapp v. Toyota World, Inc., 81 N.C. App. 421, 344 S.E.2d 297, cert. denied, 318 N.C. 283, 347 S.E.2d 464 (1986).

Determination of Facts and Law. — In cases under § 75-1.1 and this section the jury finds facts, and based on the jury's findings, the court then determines as a matter of law whether the defendant's conduct violated § 75-1.1. Chastain v. Wall, 78 N.C. App. 350, 337 S.E.2d 150 (1985), cert. denied, 316 N.C. 375, 342 S.E.2d 891 (1986); Medina v. Town & Country Ford, Inc., — N.C. App. —, 355 S.E.2d 831 (1987).

Applied in Rodgers Bldrs., Inc. v. McQueen, 76 N.C. App. 16, 331 S.E.2d 726 (1985); Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Stated in Pearce v. American De-

fender Life Ins. Co., 316 N.C. 461, 343 S.E.2d 174 (1986).

Cited in Baker v. Log Systems, 75 N.C. App. 347, 330 S.E.2d 632 (1985); Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985); L.C. Williams Oil Co. v. Exxon Corp., 625 F. Supp. 477 (M.D.N.C. 1985); United Va. Bank v. Air-Lift Assocs., 79 N.C. App. 315, 339 S.E.2d 90 (1986); Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986); Yadkin Valley Bank & Trust Co. v. Northwestern Bank, 80 N.C. App. 716, 343 S.E.2d 439 (1986); Jackson v. Hollowell Chevrolet Co., 81 N.C. App. 150, 343 S.E.2d 577 (1986); Opsahl v. Pinehurst, Inc., 81 N.C. App. 56, 344 S.E.2d 68 (1986); American Marble Corp. v. Crawford, 84 N.C. App. 86, 351 S.E.2d 848 (1987).

§ 75-16.1. Attorney fee.

Legal Periodicals. —

For comment, "Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts," see 15 N.C. Cent. L.J. 56 (1984).

CASE NOTES

Purpose. — The purpose of the statutory provisions for treble money damages and attorney's fees, this section and § 75-16, were to encourage private enforcement in the marketplace and to make the bringing of such suit more economically feasible. Winston Realty Co. v. G.H.G., Inc., 314 N.C. 90, 331 S.E.2d 677 (1985).

When Attorney's Fees May Be Awarded. — Attorney's fees may be awarded upon findings that defendant willfully engaged in unlawful acts or practices proscribed by this chapter, that there was an unwarranted refusal to fully resolve the matters, and that complainant showed some actual injury resulting from the violation. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Discretion of Trial Judge. —

In accord with main volume. See Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985); Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Award or denial of attorney's fees, even where supporting facts exist, is within the discretion of the trial judge. Olivetti Corp. v. Ames Bus. Systems, 81 N.C. App. 1, 344 S.E.2d 82, cert. granted, 317 N.C. 705, 347 S.E.2d 438 (1986).

Award of attorney's fees to plaintiff would be upheld where the trial court made findings that defendant specifically intended to deceive creditors, that his refusal to pay was unwarranted, and that as a result of defendants' actions, plaintiff supplied materials and received no payment in return. Concrete Serv. Corp. v. Investors Group, Inc., 79 N.C. App. 678, 340 S.E.2d 755, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986).

Applied in Goodrich v. Rice, 75 N.C. App. 530, 331 S.E.2d 195 (1985); Pinehurst, Inc. v. O'Leary Bros. Realty, 79 N.C. App. 51, 338 S.E.2d 918 (1986).

Stated in Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986).

Cited in Skinner v. E.F. Hutton & Co., 314 N.C. 267, 333 S.E.2d 236 (1985); Wilder v. Hodges, 80 N.C. App. 333, 342 S.E.2d 57 (1986).

§ 75-16.2. Limitation of actions.

CASE NOTES

Accrual of Cause of Action. — Any breach of contract by a trademark licensor first occurred when the third party's interim injunction based on its assertion of a superior registration effectively caused a cessation of performance of the licensor's contractual obligation, which was to continuously provide the trade-

mark for the licensee's use. On comparable reasoning, any claim for fraud or unfair trade practices also accrued no later than the date of the interim injunction. Rothmans Tobacco Co. v. Liggett Group, Inc., 770 F.2d 1246 (4th Cir. 1985).

A cause of action "accrues" under this statute when the alleged violation occurs. United States v. Ward, 618 F. Supp. 884 (E.D.N.C. 1985).

Applied in Bunting v. Perdue, Inc., 611 F. Supp. 682 (E.D.N.C. 1985).

Cited in Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986); Burgess v. Equilink Corp., 652 F. Supp. 1422 (W.D.N.C. 1987).

Article 2.

Prohibited Acts by Debt Collectors.

§ 75-51. Threats and coercion.

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of § 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under § 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

§ 75-56. Application.

The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and 75-16, in private actions or actions instituted by the Attorney General, civil penalties in excess of one thousand dollars ($1,000) shall not be imposed, nor shall damages be trebled for any violation under this Article. (1977, c. 747, s. 4; 1983, c. 417, s. 1; 1985 (Reg. Sess., 1986), c. 802.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective June 26, 1986, inserted "in private actions or actions instituted by the Attorney General," in the second sentence.

CASE NOTES

Unfair Practices. — Although in the area of debt collection, unfair or deceptive acts in commerce are limited to those acts set out in this article, those specific practices delineated as prohibited are examples of unfair practices within the broader scope of § 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

Plaintiffs' allegations of wrongful and intentional harm to their credit rating and business prospects occurring less than four years before the filing date of their complaint were of a character clearly meant to be proscribed by the act and were therefore sufficient to state a claim for which relief could be granted under § 75-1.1. Talbert v. Mauney, 80 N.C. App. 477, 343 S.E.2d 5 (1986).

§§ 75-57 to 75-79: Reserved for future codification purposes.

Article 3.

Motor Fuel Marketing Act.

§ 75-80. Title.

This Article shall be known and may be cited as the "Motor Fuel Marketing Act". (1985 (Reg. Sess., 1986), c. 972, s. 1.)

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 972, s. 2 makes this Article effective September 1, 1986.

§ 75-81. Definitions.

The following terms shall have the meanings ascribed to them in this section unless otherwise stated and unless the context or subject matter clearly indicates otherwise:

(1) "Person" shall mean any person, firm, association, organization, partnership, business trust, joint stock company, company, corporation or legal entity.

(2) "Sale" shall mean selling, offering for sale or advertising for sale.

(3) "Motor Fuel" shall mean a refined or blended petroleum product used for the propulsion of self-propelled motor vehicles; "motor fuel" shall also include the same meaning as defined by G.S. 105-430(1) and fuel as defined by G.S. 105-449.2(3).

(4) "Cost" or "Costs" shall mean as follows:

(a) For a refiner or terminal supplier, costs shall be presumed to be the refiner's or terminal supplier's prevailing price to the wholesale class of trade at the terminal used by the refiner or terminal supplier to obtain the motor fuel in question or the lowest prevailing price within 10 days prior to a sale alleged to be in violation of G.S. 75-82 hereof plus all transportation expenses including freight expenses (incurred and not otherwise included in the cost of the motor fuel), and motor fuel taxes. If a refiner or terminal supplier does not regularly sell to the wholesale class of trade at the terminal in question, then such refiner or terminal supplier shall use as the prevailing price either (i) the lowest price to the wholesale class of trade of those other refiners or terminal suppliers at the same terminal who regularly sell to the wholesaler class or (ii) a price determined by using standard functional accounting procedures.

(b) For all other sellers, cost includes the invoice or replacement cost, whichever is less, of the grade, brand or blend, of motor fuel within 10 days prior to the date of sale, in the quantity or quantities last purchased, less all rebates and discounts received including prompt payment discounts and plus all applicable

State, federal and local taxes, and transportation expenses including freight expenses, incurred and not otherwise included in the cost of the motor fuel.

(5) "Prompt Payment Discounts" shall mean any allowance for payment within a specified time, but shall not include discounts for cash made to the motoring public at motor fuel outlets.

(6) "Affiliate" shall mean any person who (other than by means of a franchise) controls, is controlled by or is under common control with, any other person.

(7) "Motor Fuel Merchant" is any person selling motor fuel to the public.

(8) "Motor Fuel Outlet" is any retail facility selling motor fuel to the motoring public.

(9) "New Retail Outlet" shall mean a new retail facility constructed from the ground or an existing retail facility that is offering motor fuel to the motoring public for the first time.

(10) "Refiner" shall mean any person engaged in the production or refining or motor fuel, whether such production or refining occurs in this State or elsewhere, and includes any affiliate of such person or firm.

(11) "Terminal Supplier" shall mean any person engaged in selling or brokering motor fuel to wholesalers or retailers from a storage facility of more than 2,000,000 gallons capacity and such person has an ownership interest in or control of the storage facility. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-82. Unlawful below-cost selling; exceptions.

(a) It shall be unlawful where the intent is to injure competition for any motor fuel merchant or the affiliate of any motor fuel merchant to sell with such frequency as to indicate a general business practice of selling at a motor fuel outlet any grade, brand or blend of motor fuel for less than the cost of that grade, brand or blend of motor fuel except where (i) the price is established in good faith to meet or compete with the lower price of a competitor in the same market area on the same level of distribution selling the same or comparable product of like quality, (ii) the price remains in effect for no more than 10 days after the first sale of that grade, brand or blend by the merchant at a new retail outlet, (iii) the sale is made in good faith to dispose of a grade, brand or blend of motor fuel for the purpose of discontinuing sales of that product, or (iv) the sale is made pursuant to the order or authority of any court or governmental agency.

(b) For purposes of this Article, motor fuel cost shall be computed separately for each grade, brand or blend of each motor fuel at each location where said motor fuel is offered for sale; however, nothing in this subsection shall prevent a motor fuel merchant from using a weighted average motor fuel cost for comparable grade, brand or blend when such motor fuel merchant is supplied by more than one refiner or terminal supplier at one or more terminals.

(c) This Article shall apply only to retail sales of motor fuel at motor fuel outlets. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-83. Unlawful inducement; civil penalty.

It shall be unlawful to knowingly induce, or to knowingly attempt to induce, a violation of this Article, whether by otherwise lawful or unlawful means. In any action initiated by the Attorney General, anyone found to have violated this provision shall be subject to the civil penalty applicable to the sales made in violation of this Article; or, if no sales were made, to a civil penalty of one thousand dollars ($1,000). (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-84. Separate offenses; injunctions.

Each act of establishing a price in violation of this Article shall constitute a separate offense by the seller and the civil penalty for each offense shall be not more than one thousand dollars ($1,000). Upon a proper showing by the Attorney General or his delegate, further violations may be temporarily or permanently enjoined. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-85. Investigations by Attorney General.

The Attorney General is authorized to investigate any allegation of a violation of this Article made by a motor fuel merchant or by an association or group of motor fuel merchants. If an investigation discloses a violation, the Attorney General may exercise the authority under this Article to seek an injunction and he may also seek civil penalties. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-86. Private actions.

Any person, corporation, or other business entity which is engaged in the sale of motor fuel for resale or consumption and which is directly or indirectly injured by a violation of this Article may bring an action in the judicial district where the violation is alleged to have occurred to recover actual damages, exemplary damages, costs and reasonable attorneys' fees. The court shall also grant such equitable relief as is proper, including a declaratory judgment and injunctive relief. Any action under this Article must be brought within one year of the alleged violation. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-87. Private action presumptions.

(a) In any private action brought under this Article, a violation shall be presumed to have occurred if: (i) the prevailing price under G.S. 75-81(4)(a) for any grade, brand or blend of a motor fuel sold by a refiner or terminal supplier to a wholesaler or retailer is greater than the price of the same grade, brand or blend of motor fuel sold by such refiner or terminal supplier directly through its own motor fuel outlet or through the outlet of an affiliate of said refiner or terminal supplier; or (ii) if the product price of any grade, brand or blend of a motor fuel sold by a wholesaler to a retailer is greater than the retail price of the same grade, brand or blend of motor fuel sold by such wholesaler through its own motor fuel outlet or the outlet of an affiliate of said wholesaler, provided the method of

delivery and quantities of each delivery of motor fuel to the retailer and to the wholesaler's outlet or affiliate's outlet are the same or comparable.

(b) A party may rebut the presumption created by this section by presenting evidence to establish his cost of the grade, brand or blend of motor fuel in question, or by qualifying for an exception under G.S. 75-82. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-88. Public disclosure.

Any refiner or terminal supplier computing prevailing price under the provisions of G.S. 75-81(4)(a)(i) or (ii) shall be required to publicly disclose said price. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

§ 75-89. Powers and remedies supplementary.

The powers and remedies provided by this Article shall be cumulative and supplementary to all powers and remedies otherwise provided by law. (1985 (Reg. Sess., 1986), c. 972, s. 1.)

Chapter 75A.

Boating and Water Safety.

Article 1.

Boating Safety Act.

Article 1.

Boating Safety Act.

§ 75A-5. Application for numbers; fee; displaying; reciprocity; change of ownership; loss of certificate; presumption from possession of certificate; conformity with United States regulations; award of certificates; records; renewal of certificates; transfer of interest, abandonment, etc.; change of address; unauthorized numbers.

(b) The owner of any vessel already covered by a number in full force and effect which has been awarded to it pursuant to then operative federal law or a federally approved numbering system of another state shall record the number prior to operating the vessel on the waters of this State in excess of the 90-day reciprocity period provided for in G.S. 75A-7(a)(1). Such recordation shall be in the manner and pursuant to the procedure required for the award of a number under subsection (a) of this section, except that no additional or substitute number shall be issued.

(*l*) When certificates of number are to be issued by agents as provided by subsection (e) of this section, the Wildlife Resources Commission is authorized by regulation to establish the qualifications of such agents, including, but not limited to, their financial responsibility, the locations and types of business operated by them and their facilities for safekeeping of unused certificates of number, validation decals, and the monetary proceeds of certificates which have been issued; to prescribe the duties of such agents, including, but not limited to, the methods of issuing certificates of number and validation decals, the evidence of ownership of vessels to be numbered by applicants for number, the times and methods of making periodic and final reports of certificates and decals issued and remaining unissued and remittances of public moneys and unissued certificates and decals; to establish methods and procedures of en-

suring accountability of such agents for the proceeds of certificates and decals issued and for certificates and decals remaining unissued; to require individual or blanket bonds of such agents in amounts sufficient to protect the State against loss of public moneys and unissued certificates and decals, the premiums for such bonds to be paid by the agents; to permit such agents to issue both original certificates of number and validation decals and renewals thereof or to limit such agents, or any of them, to the issuance of the originals only; to authorize some or all of such agents to issue temporary certificates of number for use during a limited time pending delivery of regular certificates of number and validation decals; to establish methods and procedures, including submission of the amounts and kinds of evidence which the Commission may deem sufficient, whereby any such agent may be relieved of accountability for the value of unissued certificates and validation decals, or of the monetary proceeds of those which have been issued, which have been lost or destroyed as the result of any occurrence which is beyond the control of such agent; and to prescribe such other reasonable requirements and conditions as the Commission may, in its discretion, deem necessary or desirable to expedite and control the issuance of certificates of number by such agents. In accordance with such regulations, the executive director is authorized to prepare and distribute all forms necessary or convenient for application for and the appointment and bonding of such agents and for receipts, reports and remittances by such agents; to select and appoint such agents in areas most convenient to the boating public and to limit the number of such agents in any locality; to require prompt and accurate reporting and remission of public moneys and unissued certificates and decals by such agents, and to require periodic or special audits of their accounts; to revoke or terminate any such agency for failure to make timely reports and remittances or to comply with any administrative directive or regulation of the Commission, or when he has reason to believe that State money or property is in jeopardy; and to require immediate surrender of all agency accounts, forms, certificates, decals and State moneys in the event of such revocation or termination of any such agency. A person who is denied the authority to act as an agent for the issuance of certificates of number and validation decals or whose authority to do so is revoked may not commence a contested case under G.S. 150B-23. Any violation of the regulations authorized by this subsection shall be a misdemeanor punishable in the discretion of the court. If any check or draft of any agent for the issuance of certificates of boat number shall be returned by the banking facility upon which the same is drawn for lack of funds, such agent shall be liable to the Wildlife Resources Commission for a penalty of five percent (5%) of the amount of such check or draft, but in no event shall such penalty be less than five dollars ($5.00) or more than two hundred dollars ($200.00). (1959, c. 1064, s. 5; 1961, c. 469, s. 1; 1963, c. 470; 1975, c. 483, ss. 1, 2; 1977, c. 566; 1979, c. 761, ss. 1-7; 1981, c. 161; 1983, c. 194; c. 446, ss. 1, 2; 1987, c. 827, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted "G.S. 75A-7(a)(1)" for "G.S. 75A-7(1)" in the first sentence of subsection (b) and rewrote the third sentence of subsection (*l*).

§ 75A-10.1. Family purpose doctrine applicable.

Legal Periodicals. — For note on use of the family purpose doctrine when no outsiders are involved, in light of Carver v. Carver, 310 N.C. 669, 314 S.E.2d 739 (1984), see 21 Wake Forest L. Rev. 243 (1985).

§ 75A-15. Rules on water safety; adoption of the Uniform Waterway Marking System.

(a) In accordance with subsection (b) of this section, the Wildlife Resources Commission is empowered to make rules, for the local water in question, as to:

(1) Operation of vessels, including restrictions concerning speed zones, and type of activity conducted.

(2) Promotion of boating and water safety generally by occupants of vessels, swimmers, fishermen, and others using the water.

(3) Placement and maintenance of navigation aids and markers, in conformity with governing provisions of law.

Prior to making any rules, the Commission shall investigate the water recreation and safety needs of the local water in question. In making such investigation, the Commission in its discretion may hold public hearings on the rules proposed and the general needs of the local water in question. After such investigation and application of standards, the Commission may in its discretion pass the rules requested, pass them in an amended form, or refuse to pass them. After passage, the Commission may amend or repeal the rules after first holding a public hearing.

(b) Any subdivision of this State may, but only after public notice, make formal application to the Wildlife Resources Commission for rules on waters within the subdivision's territorial limits as to the matters listed in subsection (a) of this section. The Wildlife Resources Commission may, adopt rules applicable to local areas of water defined by the Commission that are found to be heavily used for water recreation purposes by persons from other areas of the State and as to which there is not coordinated local interest in regulation.

The Wildlife Resources Commission may adopt rules prohibiting entry of vessels into public swimming areas and establishing speed zones at public boat launching ramps, marinas, or boat service areas and on other congested water areas where there are demonstrated water safety hazards. Enforcement of such rules shall be dependent upon placement and maintenance of regulatory markers in accordance with the Uniform State Waterway Marking System by such agency or agencies as may be designated by the Wildlife Resources Commission.

(c) The Uniform State Waterway Marking System as approved by the Advisory Panel of State Officials to the Merchant Marine Council, United States Coast Guard, in October 1961 is hereby adopted for use on the waters of North Carolina. The Wildlife Resources Commission is authorized to pass rules implementing the marking system and may:

(1) Modify provisions as necessary to meet the special water recreational and safety needs of this State, provided that

such modifications do not depart in any essential manner from the uniform standards being adopted in other states.

(2) Modify provisions as necessary to conform with amendments to the marking system that may be proposed for adoption by the states.

(3) Enact supplementary standards regarding design, construction, placement, and maintenance of markers.

(4) Enact clarifying rules as to matters not covered with precision in the report of the Advisory Panel of State Officials.

(5) Enact implementing rules as to matters left to State discretion in the report of the Advisory Panel of State Officials.

(6) Enact rules forbidding or restricting the placement of markers either throughout the State or in certain classes or areas of waters without prior permission having been obtained from the Commission or some agency or official designated by the Commission.

It is unlawful to place or maintain any marker of the sort covered by the marking system in the waters of North Carolina that does not conform to or is in violation of the marking system and the implementing rules of the Commission.

(d) Rules enacted under the authority of subsections (a) and (b) of this section shall supersede all local rules in conflict or incompatible with such rules. As used in this subsection, "local rules" shall include provisions relating to boating, water safety, or other recreational use of local waters in special local, or private acts, in ordinances or rules of local governing bodies, or in ordinances or rules of local water authorities. Except as may be authorized in subsections (a) and (b) of this section, no local rules may be made respecting the Uniform Waterway Marking System and its implementation or respecting supplemental safety equipment on vessels. (1959, c. 1064, s. 15; 1965, c. 394; 1969, c. 1093, s. 4; 1977, c. 424; 1983 (Reg. Sess., 1984), c. 1082, ss. 4, 5; 1987, c. 827, s. 5.)

Effect of Amendments. —

The 1987 amendment, effective August 13, 1987, substituted "rules" for "special regulations" and for "regulations" throughout this section, substitued "adopt rules applicable to" for "in accordance with applicable provisions of General Statutes Chapter 150A, adopt special regulations for" in the second sentence of subsection (b), and substituted "may adopt rules" for "is authorized and empowered to adopt regulations as provided by Chapter 150A, Administrative Procedure Act" in the third sentence of subsection (b).

Chapter 75D.

Editor's Note. — The legislation and annotations affecting Chapter 75D have been included in a recently published replacement chapter.

Chapter 76.

Navigation.

Article 5.

General Provisions.

§ 76-40. Navigable waters; certain practices regulated.

CASE NOTES

Stated in In re Mason, ex rel. Huber, 78 N.C. App. 16, 337 S.E.2d 99 (1985).

Chapter 76A.

Navigation and Pilotage Commissions.

SUBCHAPTER I. CAPE FEAR RIVER NAVIGATION AND PILOTAGE COMMISSION.

Article 2.

Pilots.

§ 76A-12. Apprentices.

The Commission when it deems necessary for the best interest of the State is hereby authorized to appoint in its discretion apprentices none of whom shall be less than 21 years of age, and to make and enforce reasonable rules and regulations regulating thereto. Apprentices shall serve for a minimum of one year but not longer than three years in order to be eligible for a limited license. The Commission shall adopt rules and regulations to monitor the progress of apprentices on a regular basis to assure the progressive development of knowledge and skill necessary to obtain a limited license. (1981, c. 910, s. 1; 1987, c. 475.)

Effect of Amendments. — The 1987 amendment, effective June 25, 1987, substituted "none of whom shall be less than 21 years of age" for "none of whom shall be less than 21 nor more than 30 years of age" in the first sentence.

Chapter 77.

Rivers, Creeks, and Coastal Waters.

Article 2.

Obstructions in Streams.

Article 2.

Obstructions in Streams.

§ 77-13. Obstructing streams a misdemeanor.

If any person shall willfully fell any tree, or willfully put any obstruction, except for the purposes of utilizing water as a motive power, in any branch, creek, or other natural passage for water, whereby the natural flow of water through such passage is lessened or retarded, and whereby the navigation of such stream by any raft or flat may be impeded, delayed, or prevented, the person so offending shall be guilty of a misdemeanor, and fined not to exceed fifty dollars ($50.00), or imprisoned not to exceed 30 days. Nothing in this section shall prevent the erection of fish dams or hedges which do not extend across more than two thirds of the width of any stream where erected, but if extending over more than two thirds of the width of any stream, the said penalties shall attach. This section may be enforced by marine fisheries inspectors, wildlife protectors, or specially commissioned forest law-enforcement officers of the Department of Natural Resources and Community Development. In any county with a population in excess of 325,000, this section may also be enforced by the county engineer. (1872-3, c. 107, ss. 1, 2; Code, s. 1123; Rev., s. 3559; C.S., s. 7377; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1; 1987, c. 641, s. 12.)

Effect of Amendments. — The 1987 amendment, effective July 20, 1987, inserted "marine fisheries inspectors, wildlife protectors, or" in the third sentence.

§ 77-14. Obstructions in streams and drainage ditches.

If any person, firm or corporation shall fell any tree or put any slabs, stumpage, sawdust, shavings, lime, refuse or any other substances in any creek, stream, river or natural or artificial drainage ravine or ditch, or in any other outlet which serves to remove water from any land whatsoever whereby the natural and normal drainage of said land is impeded, delayed or prevented, the person, firm or corporation so offending shall be guilty of a misdemeanor and upon conviction thereof shall be fined up to five hundred dollars ($500.00) or imprisoned for up to six months, or both, in the discretion of the court: Provided, however, nothing herein shall prevent the construction of any dam or weir not otherwise prohibited by any

valid local or State statute or regulation. This section may be enforced by marine fisheries inspectors, wildlife protectors, or specially commissioned forest law-enforcement officers of the Department of Natural Resources and Community Development. In any county with a population in excess of 325,000, this section may also be enforced by the county engineer. (1953, c. 1242; 1957, c. 524; 1959, cc. 160, 1125; 1961, c. 507; 1969, c. 790, s. 1; 1975, c. 509; 1977, c. 771, s. 4; 1979, c. 493, s. 1; 1987, c. 641, s. 13.)

Effect of Amendments. — The 1987 amendment, effective July 20, 1987, inserted "marine fisheries inspectors, wildlife protectors, or" in the second sentence.

Chapter 78A.

North Carolina Securities Act.

Article 1.

Title and Definitions.

§ 78A-1. Title.

CASE NOTES

Cited in Mastrom, Inc. v. Continental Cas. Co., 78 N.C. App. 483, 337 S.E.2d 162 (1985); Ward v. Zabady, — N.C. App. —, 354 S.E.2d 369 (1987).

§ 78A-2. Definitions.

When used in this Chapter, unless the context otherwise requires:

(2) "Dealer" means any person engaged in the business of effecting transactions in securities for the account of others or for his own account. "Dealer" does not include:

a. A salesman,

b. A bank, savings institution, or trust company,

c. A person who has no place of business in this State if

1. He effects transactions in this State exclusively with or through (i) the issuers of the securities involved in the transactions, (ii) other dealers, or (iii) banks, savings institutions, trust companies, insurance companies, investment companies as defined in the Investment Company Act of 1940, pension or profit-sharing trusts, or other financial institutions or institutional buyers, whether acting for themselves or as trustees, or

2. In the case of a person registered as a dealer with the Securities and Exchange Commission under

the Securities Exchange Act of 1934 and in one or more states, during any period of 12 consecutive months he does not effect more than 15 purchases or sales in this State in any manner with persons other than those specified in clause 1, whether or not the dealer or any of the purchasers or sellers is then present in this State, or

d. An issuer if

1. The security is exempted under subdivisions (1), (2), (3), (4), (5)[,] (7), (9), (10), (11), (13), or (14) of G.S. 78A-16, or the transaction is exempted under G.S. 78A-17, and such exemption has not been denied or revoked under G.S. 78A-18, or
2. The security is registered under this Chapter and it is offered and sold through a registered dealer, or
3. All of the following conditions are met: (i) No commission or other remuneration is paid or given directly or indirectly for soliciting any prospective purchaser in this State; (ii) the total amount of the offering, both within and without this State, does not exceed two million five hundred thousand dollars ($2,500,000); and (iii) the total number of purchasers, both within and without this State, does not exceed 100. Provided, however, the Administrator may by rule or order waive the condition imposed by subdivision (iii) hereof; or
4. The security is issued by an open-end management company that is registered under the Investment Company Act of 1940 and so long as no sales load is paid or given, directly or indirectly.

(1925, c. 190, s. 2; 1927, c. 149, s. 2; 1933, c. 432; 1943, c. 104, ss. 2, 3; 1955, c. 436, s. 1; 1973, c. 1380; 1983, c. 817, ss. 1-3; 1987, c. 849, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — A comma has been inserted in brackets following the reference to subdivision (5) in subdivision (2)d 1, in accordance with the apparent intent of the 1987 amendment.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, inserted "(5)" in subparagraph (2)d 2, rewrote subparagraph (2)d 3, and added subparagraph (2)d 4.

CASE NOTES

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

Article 2.

Fraudulent and Other Prohibited Practices.

§ 78A-8. Sales and purchases.

Legal Periodicals. — For note, "Skinner v. E.F. Hutton & Co.: North Carolina's Caveat Tipper Exception to the In Pari Delicto Doctrine," see 64 N.C.L. Rev. 1250 (1986).

CASE NOTES

Cited in Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986).

Article 3.

Exemptions.

§ 78A-17. Exempt transactions.

CASE NOTES

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

§ 78A-18. Denial and revocation of exemptions.

(b) In a civil or administrative proceeding brought under this Chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it. In a criminal proceeding brought under this Chapter, the State has no initial burden of producing evidence to show that the defendant's actions do not fall within the exemption or exception; however, once the defendant introduces evidence to show that his conduct is within the exemption or exception, the burden of persuading the trier of fact that the exemption or exception does not apply falls upon the State. (1925, c. 190, ss. 5, 11; 1927, c. 149, ss. 5, 11; 1973, c. 1380; 1975, c. 19, s. 20; 1987, c. 849, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, rewrote subsection (b).

Article 4.

Registration of Securities.

§ 78A-24. Registration requirement.

CASE NOTES

Cited in Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

§ 78A-30. Application to exchange securities.

(b) The Administrator shall be required to hold a hearing on an application for approval within 30 days after the filing of the application and supporting documents required by rule of the Administrator. Provided, however, if the securities or the transaction regarding which the fairness hearing is sought are otherwise exempt from the registration provisions of this Chapter: (1) the Administrator shall have until 45 days after the filing of the application and supporting documents to hold a hearing on the application for approval; and (2) the hearing on the application shall not be held until at least 10 business days after the filing of the application.

(c) Within 10 business days after holding the hearing under subsection (a), the Administrator shall issue his approval or a statement that his approval will not be forthcoming.

(1979, c. 647, ss. 2, 3; 1987, c. 849, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, added the last sentence of subsection (b) and inserted "business" near the beginning of subsection (c).

Article 5.

Registration of Dealers and Salesmen.

§ 78A-37. Registration procedure.

(b) Every applicant for initial or renewal registration shall pay a filing fee of two hundred dollars ($200.00) in the case of a dealer and forty-five dollars ($45.00) in the case of a salesman. The Administrator may by rule reduce the registration fee proportionately when the registration will be in effect for less than a full year.

(1925, c. 190, s. 19; 1927, c. 149, s. 19; 1955, c. 436, s. 9; 1959, c. 1122; 1971, c. 831, s. 1; 1973, c. 1380; 1983, c. 713, s. 48; c. 817, ss. 9, 10; 1987, c. 566, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective September 1, 1987, substituted "two hundred dollars ($200.00)" for "one hundred fifty dollars ($150.00)" and "forty-five dollars ($45.00)" for "twenty-five dollars ($25.00)" in subsection (b).

§ 78A-40. Alternative methods of registration.

(c) Nothing in this section shall be construed to prevent the exercise of the authority of the Administrator as provided in G.S. 78A-39. (1981, c. 624, s. 5; 1983, c. 817, s. 16; 1987, c. 849, s. 3.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, substituted "exercise of the authority of the Administrator" for "denial, revocation, suspension, censure, cancellation or withdrawal by the Administrator of a registration of a dealer or salesman" in subsection (c).

Article 6.

Administration and Review.

§ 78A-46. Investigations and subpoenas.

(e) The Administrator may act under subsection (b) or apply under subsection (c) to enforce subpoenas in this State at the request of a securities agency or administrator of any state if the alleged activities constituting a violation for which the information is sought would be a violation of this Chapter or any rule hereunder if the alleged activities had occurred in this State. (1925, c. 190, s. 16; 1927, c. 149, s. 16; 1973, c. 1380; 1977, c. 610, s. 2; 1987, c. 849, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Editor's Note. — A former subsection (d) of this section was repealed by Session Laws 1977, c. 610, s. 2, effective April 1, 1978.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, added present subsection (d).

§ 78A-48. Judicial review of orders.

(a) Any person aggrieved by a final order of the Administrator may obtain a review of the order in the Superior Court of Wake County by filing in court, within 30 days after a written copy of the decision is served upon the person by personal service or by registered or certified mail, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition shall be forthwith served upon the Administrator, and thereupon the Administrator shall certify and file in court a copy of the filing and evidence upon which the order was entered. When these have been filed, the court has exclusive jurisdiction to affirm, modify, enforce, or set aside the order, in whole or in part. The findings of the Administrator as to the facts, if supported by competent, material and substantial evidence, are conclusive. If either party applies to the court for leave to adduce additional material evidence, and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearings before the Administrator, the court may order the additional evidence to be taken before the Administrator and to be adduced upon the hearing in such manner and upon such conditions as the court considers proper. The Administrator may modify his findings and order by reason of the additional evidence and shall file in court the addi-

tional evidence together with any modified or new findings or order. The judgment of the court is final, subject to review by the Court of Appeals.

(1925, c. 190, s. 18; 1927, c. 149, s. 18; 1973, c. 1380; 1977, c. 610, s. 3; 1983, c. 817, s. 19; 1987, c. 849, s. 5.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, inserted "or certified" and "and shall file in court the additional evidence" in subsection (a).

§ 78A-49. Rules, forms, orders, and hearings.

(d) The Administrator may by rule or order require the filing of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature or advertising communication addressed or intended for distribution to prospective investors, unless the security or transaction is exempted by G.S. 78A-16 or 78A-17 (except 78A-17(9), (17)) and such exemption has not been denied or revoked under G.S. 78A-18.

(1925, c. 190, s. 11; 1927, c. 149, s. 11; 1973, c. 1380; 1987, c. 849, s. 6.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, inserted "(except 78A-17(9), (17))" in subsection (d).

§ 78A-50. Administrative files and opinions.

(e) The Administrator in his discretion may honor requests from interested persons for interpretative opinions. When an exemption is claimed in writing, cites the section relied upon, and is considered eligible upon the showing made, a "no action" letter will be furnished upon request and upon the payment of a fee of one hundred fifty dollars ($150.00). (1925, c. 190, s. 17; 1927, c. 149, s. 17; 1955, c. 436, s. 8; 1973, c. 1380; 1979, 2nd Sess., c. 1148, s. 3; 1987, c. 566, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective September 1, 1987, substituted "one hundred fifty dollars ($150.00)" for "ten dollars ($10.00)" in subsection (e).

Article 7.

Civil Liabilities and Criminal Penalties.

§ 78A-56. Civil liabilities.

(g)(1) No purchaser may sue under this section if, before suit is commenced, the purchaser has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the purchaser of his rights; offering to repurchase the security for cash payable on delivery of the security equal to the consideration paid, together with interest at the legal rate as provided by G.S. 24-1 from the date of payment, less the amount of any income received on the security or, if the purchaser no longer owns the security, offering to pay the purchaser upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (a); and stating that the offer may be accepted by the purchaser at any time within 30 days of its receipt; and the purchaser has failed to accept such offer in writing within the specified period.

(2) No seller may sue under this section if, before suit is commenced, the seller has received a written offer stating the respect in which liability under this section may have arisen and fairly advising the seller of his rights; offering to return the security plus the amount of any income received thereon upon payment of the consideration received, or, if the purchaser no longer owns the security, offering to pay the seller upon acceptance of the offer an amount in cash equal to the damages computed in accordance with subsection (b); and providing that the offer may be accepted by the seller at any time within 30 days of its receipt; and the seller has failed to accept such offer in writing within the specified period.

(3) Offers shall be in the form and contain the information the Administrator by rule prescribes. Every offer under subsection (g) shall be delivered to the offeree or sent by certified mail addressed to him at his last known address. If an offer is not performed in accordance with its terms, suit by the offeree under this section shall be permitted without regard to this subsection.

(1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 1380; 1975, c. 19, s. 22; c. 144, s. 3; 1977, c. 781, s. 2; 1983, c. 817, ss. 20, 21; 1987, c. 282, s. 9.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "at the legal rate" for "at at the legal rate" near the middle of subdivision (g)(1).

Legal Periodicals. —

For article discussing applicable statute of limitations in actions under the Federal Racketeer Influenced and Corrupt Organizations Act, see 7 Campbell L. Rev. 299 (1985).

For note, "Skinner v. E.F. Hutton & Co.: North Carolina's Caveat Tipper Exception to the In Pari Delicto Doctrine," see 64 N.C.L. Rev. 1250 (1986).

CASE NOTES

"Control Persons". — Controlling shareholders, officers and directors were "control persons" within the meaning of this section. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

Cattle feeding program involving the buying, financings, caring for and sale of cattle for investors, which was open to any interested investors and advertised in national publications, was an investment contract which was not entitled to a private placement exemption and hence a security within the meaning of the applicable federal and state securities laws. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

Finance Company Held Liable. — Finance company, the sole purpose of which was to provide financing to investors in cattle program which was found to be an investment contract and hence a security within the meaning of the federal and North Carolina securities laws and which was never properly registered, was liable to plaintiff as a matter of law under this section as an aider and abettor. Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

Quoted in McGarity v. Craighill, Rendleman, Ingle & Blythe, 83 N.C. App. 106, 349 S.E.2d 311 (1986).

Cited in Weft, Inc. v. G.C. Inv. Assocs., 630 F. Supp. 1138 (E.D.N.C. 1986).

§ 78A-57. Criminal penalties.

(a) Any person who willfully violates any provision of this Chapter except G.S. 78A-9, or who willfully violates any rule or order under this Chapter, or who willfully violates G.S. 78A-9 knowing the statement made to be false or misleading in any material respect, shall upon conviction be punished as a Class I felon; but no person may be imprisoned for the violation of any rule or order if he proves that he had no knowledge of the rule or order.

(1925, c. 190, s. 23; 1927, c. 149, s. 23; 1955, c. 436, s. 10; 1971, c. 572, s. 2; 1973, c. 47, s. 2; c. 1380; 1987, c. 849, s. 7.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 14, 1987, substituted "punished as a Class I felon" for "fined not more than five thousand dollars ($5,000) or imprisoned in the State prison not more than five years, or both" in subsection (a).

Article 8.

Miscellaneous Provisions.

§ 78A-63. Scope of the Chapter; service of process.

CASE NOTES

Cited in Waterman v. Alta Verde Indus., Inc., 643 F. Supp. 797 (E.D.N.C. 1986).

Chapter 78B.

Tender Offer Disclosure Act.

Sec.
78B-8. Criminal penalties.

§ 78B-8. Criminal penalties.

(a) Any person who willfully violates this Chapter may be fined not more than five thouand dollars ($5,000) or imprisoned for not more than two years or both. Each of the acts specified herein shall constitute a separate offense and a prosecution or conviction for any one of such offenses shall not bar prosecution or conviction for any other offense. No indictment or information may be returned under this Chapter more than two years after the alleged violation.

(1977, c. 781, s. 1; 1987, c. 282, s. 10.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 4, 1987, substituted "prosecution or conviction for any other offense" for "prosecution of conviction for any other offense" at the end of the second sentence of subsection (a).

Chapter 80.

Trademarks, Brands, etc.

Article 3.

Mineral Waters and Beverages.

§§ 80-24 to 80-32: Repealed by Session Laws 1987, c. 402, effective June 18, 1987.

Chapter 84.

Attorneys-at-Law.

Article 1.

Qualifications of Attorney; Unauthorized Practice of Law.

§ 84-2.1. "Practice law" defined.

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

§ 84-4.1. Limited practice of out-of-state attorneys.

Any attorney regularly admitted to practice in the courts of record of another state and in good standing therein, having been retained as attorney for any party to a legal proceeding, civil or criminal, pending in the General Court of Justice of North Carolina, or the North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina may, on motion, be admitted to practice in the General Court of Justice or North Carolina Utilities Commission or the North Carolina Industrial Commission or the Office of Administrative Hearings of North Carolina for the sole purpose of appearing for his client in said litigation, but only upon compliance with the following conditions precedent:

(1967, c. 1199, s. 1; 1971, c. 550, s. 1; 1975, c. 582, ss. 1, 2; 1977, c. 430; 1985 (Reg. Sess., 1986), c. 1022, s. 8.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the introductory paragraph is set out.

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective July 15, 1986, inserted "or the Office of Administrative Hearings of North Carolina" following "or the North Carolina Industrial Commission" in the introductory paragraph.

§ 84-5. Prohibition as to practice of law by corporation.

CASE NOTES

A licensed attorney who is a full-time employee of an insurance company may not ethically represent one of the company's insureds as counsel of record in an action brought by a third party for a claim covered by the terms of the insurance policy or appear as counsel of record for the insured in the prosecution of a subrogation claim for property damage. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

Article 2.

Relation to Client.

§ 84-11. Authority filed or produced if requested.

Legal Periodicals. —
For essay, "Toward a Revised Model of Attorney-Client Relationship: The Argument for Autonomy," see 65 N.C.L. Rev. 315 (1987).

§ 84-13. Fraudulent practice, attorney liable in double damages.

CASE NOTES

Presumption of Fraud. —
When an attorney mishandles client funds, there is a presumption of fraud as a matter of law, and this section applies. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

In a bankruptcy proceeding in which client of bankrupt attorney filed a proof of claim relating to attorney's embezzlement of money delivered to him in trust, the bankruptcy judge did not err in finding client's actual damages, then doubling the damages pursuant to this section, and finding the entire amount nondischargeable. Ehlenbeck v. Patton, 58 Bankr. 149 (W.D.N.C. 1986).

Article 3.

Arguments.

§ 84-14. Court's control of argument.

Legal Periodicals. —
For article, "Rummaging Through a Wilderness of Verbiage: The Charge Conference, Jury Argument and Instructions," see 8 Campbell L. Rev. 269 (1986).

CASE NOTES

VII. Opening and Closing Arguments.

I. GENERAL CONSIDERATION.

A trial judge's violation of the provisions of this section is prejudicial error. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Discretion of Court. —

In accord with 2nd paragraph in the main volume. See State v. Penley, 318 N.C. 30, 347 S.E.2d 783 (1986).

Cited in State v. Johnson, 317 N.C. 343, 346 S.E.2d 596 (1986).

II. SCOPE OF ARGUMENT.

A. In General.

Counsel May Argue Both Law and Fact. —

The right to argue "the whole case as well of law as of fact" to the jury arises regardless of whether the trial court's jury instructions will also relate the law on the issue. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading and Commenting on Reported Cases. —

This section grants counsel the right to argue the law to the jury, which includes the authority to read and comment on reported cases and statutes. There are, however, limitations on what portions of these cases counsel may relate. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Counsel may only read statements of the law in the case which are relevant to the issues before the jury. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Facts in Reported Cases. — Counsel may not read the facts contained in a published opinion together with the result to imply that the jury in his case should return a favorable verdict for his client. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Excerpts from Treatises in Reported Cases. — It would be an improper interpretation of this section to allow counsel to avoid the rule prohibiting counsel from reading from medical books or writings of a scientific nature to the jury except when an expert has given an opinion and cited a treatise as his authority on the basis that he read the material from an appellate reporter rather than from the magazine or book itself, especially where it was contained in an opinion that had been reversed by the Supreme Court. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

Reading Dissenting Opinion, etc.—

Counsel may not read from a dissenting opinion in a reported case. State v. Gardner, 316 N.C. 605, 342 S.E.2d 872 (1986).

IV. NUMBER OF ARGUMENTS.

In trials in the superior courts involving other than capital felonies, the State and the defendant are entitled to two addresses to the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

In a capital case as many as three counsel on each side may argue for as long as they wish, and each may address the jury as many times as he desires. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

When, in a capital case, a defendant does not offer evidence and is entitled to both open and close the argument to the jury, his attorneys may each address the jury as many times as they desire during the closing phase of the argument. The only limit to this right is the provision of this section allowing the trial judge to limit to three the number of counsel on each side who may address the jury. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

V. CAPITAL CASES.

This section places two restraints on a trial court's ability to limit jury arguments in capital felonies. First, the statute prohibits the trial court from limiting the number of addresses which can be made to the jury. Second, although the court may limit the number of attorneys who may address the jury to not less than three on each side, the statute prevents the trial court from imposing a limit on the length of the arguments. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, U.S. , 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Final Closing Argument Where Defendant Presents Evidence. — This section means that although the trial court in a capital case may limit to three the number of counsel on each side who may address the jury, those three (or however many actually argue) may argue for as long as they wish, and each may address the jury as many times as

he desires. However, if defendant presents evidence, all such addresses must be made prior to the prosecution's closing argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, U.S. , 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

Where defendant in a capital case presented evidence, the State had the right to give the final closing argument pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. This section did not give defendant the right to respond to the State's argument. State v. Gladden, 315 N.C. 398, 340 S.E.2d 673, cert. denied, U.S. , 107 S. Ct. 241, 93 L. Ed. 2d 166 (1986).

VII. OPENING AND CLOSING ARGUMENTS.

The right to closing argument is a substantial legal right of which a defendant may not be deprived by the exercise of a judge's discretion. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If, in a non-capital case, defendant elects to present evidence, he is entitled to open the argument to the jury before the prosecution argues, and two of his counsel may address the jury within the time limits prescribed by this section. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

If defendant in a non-capital case does not present evidence, he is entitled to both open and close the argument to the jury. In such case he may have one lawyer make the opening argument and one the closing, or he may waive one argument and have both lawyers address the jury during the remaining argument. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

Where defendant by stipulation waived her opening argument, the failure of the trial judge to allow both of defendant's counsel to make the closing argument was prejudicial error in the non-capital as well as the capital charges against her. State v. Eury, 317 N.C. 511, 346 S.E.2d 447 (1986).

ARTICLE 4.

North Carolina State Bar.

§ 84-15. Creation of North Carolina State Bar as an agency of the State.

CASE NOTES

Effect of Proceedings Before State Bar. — Where the status of plaintiff's license as an attorney was at issue and was finally adjudicated in proceedings before the State Bar and the Bar Council, and plaintiff did not appeal the Bar's order of disbarment, that judgment was conclusive as to those matters which were at issue and determined in those proceedings, and plaintiff could not relitigate the identical issue considered and finally determined in the proceedings before the State Bar. Vann v. North Carolina State Bar, — N.C. App. —, 339 S.E.2d 95 (1986).

§ 84-17. Government.

The government of the North Carolina State Bar is vested in a council of the North Carolina State Bar hereinafter referred to as the "council", which shall be composed of 50 councilors exclusive of officers, except as hereinafter provided, to be appointed or elected as hereinafter set forth, the officers of the North Carolina State Bar, who shall be councilors during their respective terms of office, and each retiring president of the North Carolina State Bar who shall be a councilor for one year from the date of expiration of his term as president, whose term of office expires at the 1973 annual meeting or after. Notwithstanding any other provisions of the law,

the North Carolina State Bar shall have the power and authority to acquire, hold, rent, encumber, alienate, and otherwise deal with real or personal property in the same manner as any private person or corporation, subject only to the approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing and sale of real property. The North Carolina State Bar Council is authorized and empowered in its discretion to utilize the services of the Purchase and Contract Division of the Department of Administration for the procurement of personal property, in accordance with the provisions of Article 3 of Chapter 143 of the General Statutes. Notwithstanding any provisions of this Article as to the voting powers of members, the council shall be competent to exercise the entire powers of the North Carolina State Bar in respect of the interpretation and administration of this Article, the acquisition, lease, sale, or mortgage of property, real or personal, the seeking of amendments hereto, and all other matters, except as otherwise directed or overruled, as in G.S. 84-33 provided. There shall be one councilor from each judicial district and additional councilors as are necessary to make the total number of councilors 50. The additional councilors shall be allocated and reallocated by the North Carolina State Bar every six years on the basis of the number of the active members of each judicial district bar according to the records of the North Carolina State Bar and in accordance with a formula to be adopted by the North Carolina State Bar, to insure an allocation based on lawyer population of each judicial district bar as it relates to the total number of active members of the State Bar.

A councilor whose seat has been eliminated due to a reallocation shall continue to serve on the council until expiration of the remainder of the current term.

In addition to the 50 councilors, there shall be three public members not licensed to practice law in this or any other state who shall be appointed by the Governor. (1933, c. 210, s. 3; 1937, c. 51, s. 1; 1955, c. 651, s. 1; 1961, c. 641; 1973, c. 1152, s. 2; 1977, c. 841, s. 2; 1979, c. 570, ss. 1, 2; 1981, c. 788, s. 3; 1985, c. 60, s. 1; 1987, c. 316, s. 1.)

Effect of Amendments. —

The 1987 amendment, effective June 8, 1987, deleted the former first sentence of the second paragraph, which read "In the event a judicial district is divided after any allocation as hereinafter provided, then the total number of councilors shall be increased until the next allocation, so as to provide one councilor for each such district, unless the district has one or more councilors who are members of such judicial district."

§ 84-18. Terms, election and appointment of councilors.

(a) Except as set out in this section, the terms of councilors are fixed at three years commencing on the first day of January in the year following their election. A year shall be the calendar year. No councilor may serve more than three successive three-year terms but a councilor may serve an unlimited number of three successive three-year terms provided a three-year period of nonservice intervenes in each instance. This paragraph shall not apply to officers of the State Bar.

All councilors serving at the effective date of these changes shall remain in office and continue to represent their district for the

remainder of their term. Those who have already served for 18 months or more shall be eligible for election to two additional three-year terms and be ineligible for election thereafter until a period of three years has expired. Those who have served less than 18 months shall be eligible for election to three consecutive three-year terms and be ineligible for election thereafter until an intervening three-year period has expired.

When a judicial district loses a councilor or is entitled to an additional councilor by virtue of reallocation of councilors as provided in G.S. 84-17 above, then the affected judicial districts shall certify to the State Bar Council the identity of that judicial district's authorized councilor or councilors. This certification shall be made within 90 days of the date the reallocation is made and reported to the judicial districts affected. Until this certification is received, the district shall have no representation on the State Bar Council. In the case of reallocation, the certification shall be made within 90 days.

Any North Carolina State Bar member, other than an inactive member, is eligible to serve as a councilor from the judicial district in which he or she is eligible to vote.

(1933, c. 210, s. 4; 1953, c. 1310, s. 1; 1979, c. 570, s. 3; 1981, c. 788, s. 4; 1985, c. 60, ss. 2, 3; 1987, c. 316, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 8, 1987, deleted "or is entitled to a councilor by virtue of the creation of a new district" following "as provided in G.S. 84-17 above," in the first sentence of the third paragraph of subsection (a).

§ 84-19. Judicial districts definition.

For purposes of this Article, the term "judicial district" means a judicial district as in existence on January 1, 1987, and the term "district bar" means the bar of a judicial district as defined by this section. (1933, c. 210, s. 5; 1955, c. 651, s. 2; 1979, c. 570, s. 4; 1987, c. 316, s. 3.)

Effect of Amendments. — The 1987 amendment, effective June 8, 1987, rewrote this section, which formerly related to the change of judicial districts.

§ 84-28. Discipline and disbarment.

(h) There shall be an appeal of right from any final order imposing reprimand, censure, suspension or disbarment upon an attorney, or involuntary transferring a member of the North Carolina State Bar to inactive status for mental incompetence or physical disability, to the appellate division. Review by the appellate division shall be upon matters of law or legal inference. The procedures governing any such appeal shall be as provided by statute or court rule for appeals in civil cases. A final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas. A final order imposing suspension for less than 18 months or any other discipline except disbarment shall be stayed pending determination of the appeal.

(1933, c. 210, s. 11; 1937, c. 51, s. 3; 1959, c. 1282, ss. 1, 2; 1961, c. 1075; 1969, c. 44, s. 61; 1975, c. 582, s. 5; 1979, c. 570, ss. 6, 7; 1983, c. 390, ss. 2, 3; 1985, c. 167; 1987, c. 316, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. —

The 1987 amendment, effective June 8, 1987, rewrote the fourth sentence of subsection (h), which read "During the period from the ratification of this act [May 10, 1985] to October 1, 1987, a final order which imposes disbarment or suspension for 18 months or more shall not be stayed except upon application, under the rules of the Court of Appeals, for a writ of supersedeas."

CASE NOTES

I. GENERAL CONSIDERATION.

Loss of Right to Claim Negligence of Attorney by Pursuing Initial Claim. — Where wife had a claim for permanent alimony which was lost by the negligence of her attorney, she then retained another attorney who filed a counterclaim for alimony, and the alimony agreement negotiated by the first attorney was rescinded and a second alimony agreement was signed, by pursuing her claim for alimony against her husband the wife lost her right to make a claim against the first attorney for his negligence in representing the plaintiff in her original alimony claim. Stewart v. Herring, — N.C. App. —, 342 S.E.2d 566 (1986).

II. SANCTIONS.

Sanctions Authorized by Statute Not Subject to Review. — Where an attorney's sanction, a one-year suspension, was by her own admission authorized by statute, it was not subject to review. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

So long as the punishment imposed is within the limits allowed by statute, the Court of Appeals does not have the authority to modify or change it. North Carolina State Bar v. Whitted, 82 N.C. App. 531, 347 S.E.2d 60, cert. granted as to additional issues, 318 N.C. 508, 349 S.E.2d 863 (1986).

III. APPEALS.

"Whole Record" Test. — The test for determining whether the findings of the disciplinary committee are supported by the evidence is the "whole record" test. Under this test there must be substantial evidence, based on a review of the record, to support the committee's findings, conclusions and results. North Carolina State Bar v. Wilson, 74 N.C. App. 777, 330 S.E.2d 280 (1985).

§ 84-36. Inherent powers of courts unaffected.

CASE NOTES

Concurrent Power of Supreme Court and Bar to Regulate Conduct of Attorneys. — While questions of propriety and ethics are ordinarily for the consideration of the bar, because that organization was expressly created by the legislature to deal with such questions, nevertheless the power to regulate the conduct of attorneys is held concurrently by the bar and the Supreme Court. Therefore, in a proper case, the Court may rule on questions concerning the conduct of attorneys. Gardner v. North Carolina State Bar, 316 N.C. 285, 341 S.E.2d 517 (1986).

The Judicial Method Is Not Dependent, etc. —

In accord with the main volume. See In re Paul, — N.C. App. —, 353 S.E.2d 254 (1987).

Form of Disciplinary Action. — Judicial disciplinary action may take the form of an order of disbarment or suspension of the attorney's privilege to practice law. In re Paul, — N.C. App. —, 353 S.E.2d 254 (1987).

Disbarment Order Supported by Contempt Conviction. — The trial court's findings of fact supported order disbarring respondent attorney, where

respondent was convicted of contempt for soliciting someone to disrupt a criminal trial in which he, respondent, represented the defendant. In re Paul, — N.C. App. —, 353 S.E.2d 254 (1987).

Chapter 85B.

Auctions and Auctioneers.

§ 85B-6. Fees; local governments not to charge fees or require licenses.

OPINIONS OF ATTORNEY GENERAL

Applicability of Itinerant Merchant License Requirement. — If an auctioneer travels into a city or county in which he does not maintain a regular place of business and sells or auctions property owned by him, he must obtain an itinerant merchant license pursuant to § 105-53(d), as well as comply with any ordinances of the particular city or county governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

An auctioneer is not deemed to be an itinerant merchant if he travels into a city or county in which he does not maintain a regular place of business and auctions merchandise belonging to another person, whether or not that person maintains a regular place of business in the particular city or county. Therefore, such an auctioneer would not be required to comply with § 105-53(d) or any local ordinances of the particular city or county governing itinerant merchants. However, if the owner of the goods to be auctioned off does not maintain a regular place of business in the particular city or county, that person would be required to comply with § 105-53(d) and any local ordinances governing itinerant merchants. See opinion of Attorney General to Mr. DeWitt S. McCarley, City Attorney, Greenville, North Carolina, 55 N.C.A.G. 38 (1985).

Chapter 85C.

Bail Bondsmen and Runners.

§ 85C-11. Qualification for professional bondsmen and runners.

Before license can issue to an applicant permitting him to act as a professional bondsman or runner, he must furnish the Commissioner a complete set of his fingerprints and a recent passport size full-face photograph of himself. The applicant's fingerprints shall be certified by an authorized law-enforcement officer.

Every applicant for license as a professional bondsman or runner before being issued such license shall satisfy the Commissioner that he:

(1) Is 18 years of age or over;
(2) Is a resident of this State;
(3) Is a person of good moral character and has not been convicted of a felony or any crime involving moral turpitude;
(4) Has knowledge, training, or experience of sufficient duration and extent to reasonably satisfy the Commissioner that he possesses the competence necessary to fulfill the responsibilities of a licensee;
(5) Has no outstanding bail bond obligations. (1963, c. 1225, s. 11; 1971, c. 1231, s. 1; 1975, c. 619, s. 1; 1987, c. 728, s. 1.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added subdivision (5).

§ 85C-14. Contents of application for runner's license; endorsement by bail bondsman.

In addition to the other requirements of this Chapter, an applicant for a license to be a runner must affirmatively show:

(1) That the applicant will be employed by only one bail bondsman who will supervise the work of the applicant and be responsible for the runner's conduct in the bail bond business; and
(2) That the application is endorsed by the appointing bail bondsman who shall obligate himself therein to supervise the runner's activities.
(3) That the applicant has disclosed whether he has ever been licensed as a professional bondsman or runner. If the applicant has ever been licensed as a professional bondsman, he shall list all outstanding bail bond obligations. If the applicant has ever been licensed as a runner, he shall list all prior employment as such, indicating the name of each bail

bondsman by whom he has been employed and the reason or reasons for the termination of the employment. (1963, c. 1225, s. 14; 1975, c. 619, s. 1; 1987, c. 728, s. 2.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, added subdivision (3).

§ 85C-36. Limit on principal amount of bond to be written by professional bondsman.

No professional bondsman shall act as surety on any bail bond or bonds for any one individual pertaining to any charges arising out of one transaction or related transactions whose principal sum is in excess of one fourth of the value of the securities deposited with the Commissioner at that time. (1975, c. 619, s. 1; 1987, c. 728, s. 3.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, inserted "or bonds for any one individual pertaining to any charges arising out of one transaction or related transactions".

Chapter 86A.

Barbers.

§ 86A-12. Applicants licensed in other states.

(a) The Board shall issue, without examination, a license to applicants already licensed in another state provided the applicant presents evidence satisfactory to the Board that:

(1) He is currently an active, competent practitioner in good standing; and

(2) He has practiced at least three out of the five years immediately preceding his application; and

(3) He currently holds a valid license in another state; and

(4) There is no disciplinary proceeding or unresolved complaint pending against him at the time a license is to be issued by this State; and

(5) The licensure requirements in the other state are the substantive equivalent of those required by this State.

(b) The requirements in subdivisions (1) or (5), or both, of subsection (a) of this section may be waived by the Board provided that the applicant presents evidence satisfactory to the Board that the applicant:

(1) Has met the licensure requirements of the state in which he received his license;

(2) Has at least five years practical experience; and

(3) Demonstrates his knowledge of barbering skills and of the sanitary regulations in North Carolina by passing a practical, written or oral examination.

(c) Any license granted pursuant to this section is subject to the same duties and obligations and entitled to the same rights and privileges as a license issued under G.S. 86A-3. (1929, c. 119, s. 12; 1941, c. 375, s. 5; 1947, c. 1024; 1961, c. 577, s. 2; 1979, c. 695, s. 1; 1981, c. 457, s. 8; 1987, c. 210.)

Effect of Amendments. — The 1987 amendment, effective October 1, 1987, designated the first paragraph, with its subdivisions (1) to (5), as subsection (a), inserted "without examination" in the introductory language of subsection (a), added new subsection (b), and designated the final paragraph as subsection (c).

Chapter 87.

Contractors.

Article 7.

North Carolina Well Construction Act.

Article 1.

General Contractors.

§ 87-1. "General contractor" defined; exceptions.

Legal Periodicals. —
For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

For survey of North Carolina construction law, see 21 Wake Forest L. Rev. 633 (1986).

CASE NOTES

I. GENERAL CONSIDERATION.

The purpose of this Article, etc. — The purpose of this Article is to deter unlicensed persons from engaging in the construction business. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

Applicability of this Article, etc. — A person is a general contractor if the cost of the undertaking exceeds the statutory limit. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985).

Control Is Principal Distinguishing Characteristic between Contractor and Subcontractor. — The principal characteristic distinguishing a general contractor from subcontractor or other party contracting with the owner with respect to a portion of the project, or a mere employee, is the degree of control to be exercised by the contractor over the construction of the entire project. Mill-Power Supply Co. v. CVM Assocs., — N.C. App. —, 355 S.E.2d 245 (1987).

Genuine Issue of Material Fact as to Degree of Control. — Although plaintiff constructed an improvement under this section, a genuine issue of material fact existed as to whether, following the "control test," plaintiff exercised such a degree of control over the entire renovation project as to make plaintiff a general contractor under this section, requiring plaintiff to be licensed in order to bring an action for breach of contract. Mill-Power Supply Co. v. CVM Assocs., — N.C. App. —, 355 S.E.2d 245 (1987).

A contractor engages in construction when he undertakes to build an entire building or improve an already existing building. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Cost of Undertaking Where Contractor Controls Purchases. — Builder, although not licensed as a general contractor, met the threshold criteria of this section, in that he exercised a substantial degree of control by his supervision of construction, his purchase of material, and his selection of material suppliers. And where his purchase of materials alone totalled over $29,000.00, and the fee for his services and supervision was $16,785.57, the threshold amount of $30,000.00 was well exceeded. Spears v. Walker, 75 N.C. App. 169, 330 S.E.2d 38 (1985), upholding summary judgment in defendants' favor on grounds that plaintiff

was barred from recovery as a matter of law.

Adding Roof Constitutes "Improvement". — Plaintiff undertook to construct an "improvement" under this section by adding a roof over an existing structure. Mill-Power Supply Co. v. CVM Assocs., — N.C. App. —, 355 S.E.2d 245 (1987).

II. UNLICENSED CONTRACTORS.

Licensure Is Prerequisite to Recovery from Owner. — In North Carolina, a person who contracts to construct a building or structure costing $30,000.00 or more, pursuant to this chapter, must be licensed to recover from the owner for breach of contract or on the theory of quantum meruit. Mill-Power Supply Co. v. CVM Assocs., — N.C. App. —, 355 S.E.2d 245 (1987).

Recovery on Quantum Meruit Precluded. — The same rule which prevented an unlicensed contractor from recovering for breach of a construction contract also denied its recovery on the theory of quantum meruit. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of this section. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of § 87-10, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Persons found to be subcontractors are not required to be licensed, and may sue the general contractor for breach of contract. Mill-Power Supply Co. v. CVM Assocs., — N.C. App. —, 355 S.E.2d 245 (1987).

Corporation could not enforce its contract on the basis of the individual license of its president and sole shareholder. Joe Newton, Inc. v. Tull, 75 N.C. App. 325, 330 S.E.2d 664 (1985).

Cited in Turner v. Nicholson Properties, Inc., 80 N.C. App. 208, 341 S.E.2d 42 (1986).

OPINIONS OF ATTORNEY GENERAL

Builder's Construction of Rental Units on Own Property and Leasing to General Public. — The exemption contained in this section allows an unlicensed builder to construct rental units on his own property and lease them to the general public without being licensed as a general contractor under this section. See opinion of Attorney General to Mr. Charles L. Moore, Gaston County Attorney, 55 N.C.A.G. 7 (1985).

§ 87-2. Licensing Board; organization.

Legal Periodicals. —

For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

§ 87-8. Records; roster of licensed contractors.

Legal Periodicals. — For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

§ 87-10. Application for license; examination; certificate; renewal.

Legal Periodicals. —
For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Purpose. —
The purpose of this section, the North Carolina licensing statute, is to guarantee skill, training and ability to accomplish construction in a safe and workmanlike fashion. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Unlicensed Party May Not Maintain Action. —
Where plaintiff engaged in renovation including the installation of new roofing, correction of dry rot, installation of new storm doors and windows, and the complete renovation of all apartment interiors, the renovation improved already existing buildings and constituted construction within the meaning of § 87-1. And as plaintiff undertook to "superintend or manage" this construction without complying with the licensing requirements of this section, plaintiff was not entitled to recover from defendant on the contract or in quantum meruit. Reliable Properties, Inc. v. McAllister, 77 N.C. App. 783, 336 S.E.2d 108 (1985), cert. denied, 316 N.C. 379, 342 S.E.2d 897 (1986).

Applied in Sartin v. Carter, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

§ 87-13. Unauthorized practice of contracting; impersonating contractor; false certificate; giving false evidence to Board; penalties.

Legal Periodicals. —
For comment, "Application of North Carolina's Contractor Licensing Statute to Parallel Prime Contractors," see 20 Wake Forest L. Rev. 717 (1984).

CASE NOTES

Applied in Sartin v. Carter, 76 N.C. App. 278, 332 S.E.2d 521 (1985).

Article 2.

Plumbing and Heating Contractors.

§ 87-16. Board of Examiners; appointment; term of office.

Local Modification. —
By virtue of Session Laws 1987, c. 740, s. 4 the Local Modification note under this section for Public Laws 1939, c. 297, relating to Surry and the Town of Elkin, should be deleted.

Article 7.

North Carolina Well Construction Act.

§ 87-85. Definitions.

As used in this Article, unless the context otherwise requires:

(17) "Operation of wells" means the process, frequency, and duration of withdrawing water or other fluids from a well by any means. (1967, c. 1157, s. 3; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1987, c. 496, s. 1.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 29, 1987, added subdivision (17).

§ 87-86. Scope.

No person shall construct, operate, repair, or abandon, or cause to be constructed, operated, repaired, or abandoned, any well, nor shall any person install, repair, or cause to be installed or repaired, any pump or pumping equipment contrary to the provisions of this Article and applicable rules and regulations, provided that this Article shall not apply to any distribution of water beyond the point of discharge from the pump. (1967, c. 1157, s. 4; 1987, c. 496, ss. 2, 3.)

Effect of Amendments. — The 1987 amendment, effective June 29, 1987, inserted "operate" and "operated" near the beginning of the section.

§ 87-87. Authority to adopt rules, regulations, and procedures.

The Environmental Management Commission shall adopt, and may from time to time amend, rules and regulations not inconsistent with this Article governing the location, construction, repair, and abandonment of wells, the operation of water wells or well systems with a designed capacity of 100,000 gallons per day or greater, and the installation and repair of pumps and pumping equipment, and shall be responsible for the administration of this Article. With respect thereto it shall:

(1967, c. 1157, s. 5; 1973, c. 1262, s. 23; 1985, c. 728, s. 4; 1987, c. 496, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, only the introductory paragraph is set out.

Effect of Amendments. — The 1987 amendment, effective June 29, 1987, added "the operation of water wells or well systems with a designed capacity of 100,000 gallons per day or greater" in the first sentence of the introductory paragraph.

§ 87-88. General standards and requirements.

(c) Prevention of Contamination. — Every well shall be constructed and maintained in a condition whereby it is not a source or channel of contamination of the groundwater supply or any aquifer. Wells subject to the provisions of subdivision (a)(i) of this section shall be operated in such a way that they shall not cause the violation of applicable groundwater quality standards. Contamination as used herein shall mean the act of introducing into water foreign materials of such a nature, quality, and quantity as to cause degradation of the quality of the water.

(1967, c. 1157, s. 6; 1973, c. 476, s. 128; c. 1262, s. 23; 1987, c. 496, s. 4.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 29, 1987, inserted the present second sentence of subsection (c).

§ 87-92. Hearings; appeals.

Any person wishing to contest a penalty, permit decision, or other order issued under this Article shall be entitled to an administrative hearing and judicial review conducted according to the procedures established in Chapter 150B of the General Statutes. (1967, c. 1157, s. 10; 1973, c. 1262, s. 23; 1977, c. 771, s. 4; 1985, c. 728, s. 1; 1987, c. 827, ss. 1, 70.)

Effect of Amendments. — The 1987 amendment substituted reference to Chapter 150B for reference to Chapter 150A, and deleted "Article 3 and Article 4 of" preceding "Chapter 150B."

§ 87-94. Civil penalties.

(c) In determining the amount of the penalty, the Commission shall consider the degree and extent of harm caused by the violation, the cost of rectifying the damage, the amount of money the violator saved by his noncompliance, whether or not the violation was committed willfully, and the prior record of the violator in complying or failing to comply with this Article.

(1967, c. 1157, s. 12; 1985, c. 728, s. 3; 1987, c. 246, s. 2.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective June 2, 1987, substituted "noncompliance" for "compliance" in subsection (c).

Chapter 88.

Cosmetic Art.

§ 88-1. Practice of cosmetology regulated; permits for operation of cosmetic art shops.

On and after June 30, 1933, no person or combination of persons shall, for pay or reward, either directly or indirectly, practice or attempt to practice cosmetic art as hereinafter defined in the State of North Carolina without a certificate of registration, either as a registered apprentice or as a registered "cosmetologist," issued pursuant to the provisions of this Chapter by the State Board of Cosmetic Art Examiners hereinafter established and, except as provided in G.S. 88-7.1; the practice of cosmetic art shall not be performed outside of a licensed and regularly inspected beauty establishment.

The operator of a cosmetic art shop, beauty parlor or hairdressing establishment may employ unlicensed personnel to do shampooing only, where the shampooing is done under the supervision of a registered cosmetologist. As used in this paragraph, "shampooing" includes only the application of shampoo to hair and the removal of the shampoo from the hair, and does not include any arranging, dressing, waving, marcelling or other treatment of hair. This paragraph does not apply to barbershops. This paragraph shall not apply to the following counties: Duplin, Guilford, Jones, Lenoir, Mecklenburg, Onslow, Richmond, Sampson.

On and after February 1, 1976, any person, firm or corporation, before establishing or opening a cosmetic art shop not heretofore licensed by the State Board of Cosmetic Art, shall make application to the Board, on forms to be furnished by the Board, for a permit to operate a cosmetic art shop. The shop of such applicant shall be inspected and approved by the State Board of Cosmetic Art by an agent designated for such purpose by the Board before such cosmetic art shop shall be opened for business. It shall be unlawful to open a new cosmetic art shop for the practice of cosmetology until such shop has been inspected, as heretofore required, and determined by the Board to be in compliance with the requirements set forth in this Chapter. Upon the determination by the Board that the applicant has complied with the requirements of this Chapter, the Board shall issue to such applicant a permit to operate a cosmetic art shop. A fee of twenty-five dollars ($25.00) shall be paid to the Board for the inspection of a cosmetic art shop. Such fee must accompany the application for a permit to operate a cosmetic art shop at the time such application is filed with the Board.

All cosmetic art shops in operation as of February 1, 1976, shall be required to make application to the Board of Cosmetic Art, on forms supplied by the Board, for a permit to operate. The fee re-

quired for such permit shall be three dollars ($3.00) per active booth in said shop.

Thereafter, all permits shall be renewed as of the first day of February of each and every year, and the fee for annual renewal of cosmetic art shop permits shall be as set forth in G.S. 88-21. No permit or certificate shall be transferable from one location to another or from one owner to another at the same location. Each cosmetic art shop permit shall be conspicuously posted within such cosmetic art shop for which same is issued. (1933, c. 179, s. 1; 1973, c. 1481, ss. 1, 2; 1975, c. 7; c. 857, s. 1; 1977, cc. 155, 472; 1981, c. 615, ss. 1, 2; 1983 (Reg. Sess., 1984), c. 990; 1985, c. 125; 1985 (Reg. Sess., 1986), c. 833.)

Effect of Amendments. — The 1985 (Reg. Sess., 1986) amendment, effective September 1, 1986, deleted a reference to Randolph County from the last sentence of the second paragraph.

§ 88-13. State Board of Cosmetic Art Examiners created; appointment and qualifications of members; term of office; removal for cause.

(a) The State Board of Cosmetic Art Examiners is established to consist of four members appointed by the Governor and two members appointed by the General Assembly on July 1, 1987. Five members shall be experienced, licensed cosmetologists who have practiced all branches of cosmetic art in this State for at least five years immediately preceding appointment to the Board. These members shall be free of any connection with any cosmetic art school, college, academy, or training school during their service on the Board. The other member shall be a person who is not licensed under this Chapter and who shall represent the interest of the public at large.

(b) Cosmetologist members of the Board shall serve staggered three-year terms. In order to estalish a staggered term system, the terms of those members currently serving on the Board shall expire as follows: the term of the member having served the longest time on the Board shall expire on June 30, 1981; the term of the member having served the least time on the Board shall expire on June 30, 1983; and the term of the remaining cosmetologist member shall expire on June 30, 1982. Thereafter, all cosmetologist members shall serve three-year terms. One of the additional cosmetologist members added to the Board on July 1, 1987, shall be appointed by the General Assembly on the recommendation of the Lieutenant Governor in accordance with G.S. 120-121 and shall serve until June 30, 1990. The other additional cosmetologist member added to the Board on July 1, 1987, shall be appointed by the General Assembly on the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 and shall serve until June 30, 1989.

The Governor shall appoint the public member not later than July 1, 1981, to serve a three-year term.

No Board member appointed on or after July 1, 1981, shall serve more than two complete consecutive three-year terms, except that

each member shall serve until his successor is appointed and qualifies.

(c) The Governor may remove any member for good cause shown and may appoint members to fill unexpired terms of the members originally appointed by him. Vacancies in positions appointed by the General Assembly shall be filled in accordance with G.S. 120-122. (1933, c. 179, s. 13; 1935, c. 54, s. 2; 1973, c. 1360, s. 1; 1975, c. 857, s. 2; 1981, c. 615, s. 10; 1987, c. 211, s. 1.)

Effect of Amendments. — The 1987 amendment, effective May 18, 1987, added "and two members appointed by the General Assembly on July 1, 1987" at the end of the first sentence of subsection (a), substituted "Five members" for "Three members" at the beginning of the second sentence of subsection (a), added the last two sentences of the first paragraph of subsection (b), inserted "three-year" preceding "terms" in the third paragraph of subsection (b), added "of the members originally appointed by him" at the end of the first sentence of subsection (c), and added the second sentence of subsection (c).

Chapter 89A.

Landscape Architects.

§ 89A-7. Refusal, revocation or suspension of certificate.

The Board may, in accordance with the provisions of Chapter 150B of the General Statutes: (i) deny permission to take an examination duly applied for; (ii) deny license after examination for any cause other than failure to pass; (iii) withhold renewal of a license for cause; and (iv) suspend or revoke a license. Grounds for such action or actions shall be dishonest practice, unprofessional conduct, incompetence, conviction of a felony or addiction to habits of such character as to render him unfit to continue professional practice. The procedure for all such actions shall be in accordance with the provisions of Chapter 150B of the General Statutes. (1969, c. 672, s. 7; 1973, c. 1331, s. 3; 1987, c. 827, ss. 1, 71.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted reference to Chapter 150B for reference to Chapter 150A in the first and final sentences and substituted "of the General Statutes:" for "Uniform Revocation of Licenses, of the General Statutes of North Carolina" in the first sentence.

§ 89A-8. Violation a misdemeanor; injunction to prevent violation.

(b) The Board may appear in its own name in the courts of the State and apply for injunctions to prevent violations of this Chapter. (1969, c. 672, s. 8; 1973, c. 1331, s. 3; 1987, c. 827, s. 72.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted "in accordance with the provisions of Chapter 150A of the General Statutes" at the end of subsection (b).

Chapter 89C.

Engineering and Land Surveying.

§ 89C-4. State Board of Registration; appointment; terms.

CASE NOTES

Stated in North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

§ 89C-10. (For effective date and applicability date see Editor's note) Board powers.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 16 amends this section, but s. 17 of c. 977 provides:

"This act shall become effective October 1, 1986, and shall apply to those candidates sitting for the land surveyors examinations after September 1, 1992. The changes made by this act shall not apply to persons currently holding land surveyor certificates on the effective date of this act."

The amendment by Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 16, inserts a second sentence in subsection (g). As amended by c. 977, s. 16, subsection (g) reads as follows:

"(g) The Board is authorized and empowered to use its funds to establish and conduct instructional programs for persons who are currently registered to practice engineering or land surveying, as well as refresher courses for persons interested in obtaining adequate instruction or programs of study to qualify them for registration to practice engineering or land surveying. The Board may expend its funds for these purposes and is authorized and empowered not only to conduct, sponsor, and arrange for instructional programs, but also to carry out such programs through extension courses or other media, and the Board may enter into plans or agreements with community colleges, institutions of higher learning, both public and private, State and county boards of education, or with the governing authority of any industrial education center for the purpose of planning, scheduling or arranging such courses, instruction, extension courses, or in assisting in obtaining courses of study or programs in the field of engineering and land surveying. The Board shall make every effort practical to encourage the educational institutions in this State to offer courses necessary to complete the educational requirements of this Chapter. For the purpose of carrying out these objectives, the Board is authorized to make and promulgate such rules and regulations as may be necessary for such educational programs, instruction, extension services, or for entering into plans or contracts with persons or educational and industrial institutions."

§ 89C-10 has a delayed effective date. See notes for date.

§ 89C-13. (For effective date and applicability date see Editor's note) General requirements for registration.

Editor's Note. — Session Laws 1985 (Reg. Sess., 1986), c. 977, ss. 1 to 15 amends this section, but s. 17 of c. 977 provides:

"This act shall become effective October 1, 1986, and shall apply to those candidates sitting for the land surveyors examinations after September 1, 1992. The changes made by this act shall not apply to persons currently holding land surveyor certificates on the effective date of this act."

The amendment by Session Laws 1985 (Reg. Sess., 1986), c. 977, ss. 1 to 15, inserts "(shall meet one):" at the end of the introductory language of subdivisions (a)(1), (a)(2), (b)(1) and (b)(2); adds three sentences at the end of paragraph (b)(1)a; rewrites paragraph (b)(1)b; in paragraph (b)(1)d substitutes "seven years" for "six years" and "six years" for "four years"; deletes paragraph (b)(1)e, relating to the submission of exhibits, drawings, etc.; inserts a comma following the word "event" in the second sentence of paragraph (b)(1)f; adds "and the two four-hour examinations on the fundamentals of land surveying" at the end of the first sentence of paragraph (b)(1)g; adds a sentence at the end of subdivision (b)(1), following paragraphs a through h; rewrites paragraph (b)(2)a; deletes the comma following "equivalent curricula in surveying" and substitutes "examinations" for "examination" in paragraph (b)(2)b; rewrites paragraph (b)(2)c; and adds a sentence at the end of subdivision (b)(2), following paragraphs a through c. As amended by c. 977, ss. 1 to 15, the section reads as follows:

"§ 89C-13. General requirements for registration.

"(a) Engineer Applicant. — To be eligible for admission to examination for professional engineer an applicant must be of good character and reputation. An applicant desiring to take the examination in the fundamentals of engineering only must submit three character references. An applicant desiring to take the examination in the principles and practice of engineering must submit five references, two of whom shall be professional engineers having personal knowledge of his engineering experiences.

"The following shall be considered as minimum evidence satisfactory to the Board that the applicant is qualified for registration:

"(1) As a professional engineer (shall meet one):

"a. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of engineering, on the basis of comparable qualifications, issued to him by a proper authority of a state, territory, or possession of the United States, the District of Columbia, or of Canada, who in the opinion of the Board, meets the requirements of this Chapter, based on verified evidence may, upon application, be registered without further examination.

"A person holding a certificate of qualification issued by the Committee on National Engineering Certification of the National Council of Engineering Examiners, whose qualifications meet the requirements of this Chapter, may upon application, be registered without further examination.

"b. E.I.T. Certificate, Experience, and Examination. — A holder of a certificate of engineer-in-training issued by the Board, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour examination in the principles and practices of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration

§ 89C-13 has a delayed effective date. See notes for date.

to practice professional engineering in this State, provided he is otherwise qualified.

"c. Graduation, Experience, and Examination. — A graduate of an engineering curriculum of four years or more approved by the Board as being of satisfactory standing, and with a specific record of an additional four years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering, shall be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"d. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as being of satisfactory standing or with an equivalent education and engineering experience satisfactory to the Board and with a specific record of eight years or more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent in the fundamentals of engineering, shall be admitted to an eight-hour written examination in the fundamentals of engineering, and an eight-hour written examination in the principles and practices of engineering. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"e. Long-Established Practice. — An individual with a specific record of 20 years of more of progressive experience on engineering projects of a grade and character which indicates to the Board that the applicant may be competent to practice engineering shall be admitted to an eight-hour written examination in the principles and practice of engineering. Upon passing such examination, the applicant shall be granted a certificate of registration to practice professional engineering in this State, provided he is otherwise qualified.

"At its discretion the Board may require an applicant to submit exhibits, drawings, designs, or other tangible evidence of engineering work executed by him and which he personally accomplished or supervised.

"The following shall be considered as minimum evidence that the applicant is qualified for certification:

"(2) As an engineer-in-training (shall meet one):

"a. Graduation and Examination. — A graduate of an engineering curriculum or related science curriculum of four years or more, approved by the Board as being of satisfactory standing, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training, if he is otherwise qualified.

"b. Graduation, Experience, and Examination. — A graduate of an engineering or related science curriculum of four years or more, other than the ones approved by the Board as be-

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ing of satisfactory standing, or with equivalent education and engineering experience satisfactory to the Board and with a specific record of four or more years of progressive experience on engineering projects of a grade and character satisfactory to the Board, shall be admitted to an eight-hour written examination in the fundamentals of engineering. The applicant shall be notified if the examination was passed or not passed and if passed he shall be certified as an engineer-in-training if he is otherwise qualified.

"(b) Land Surveyor Applicant. — To be eligible for admission to examination for land surveyor-in-training, or registered land surveyor, an applicant must be of good character and reputation and shall submit five references with his application for registration as a land surveyor, two of which references shall be registered land surveyors having personal knowledge of his land surveying experience, or in the case of an application for certification as a land surveyor-in-training by three references, one of which shall be a registered land surveyor having personal knowledge of the applicant's land surveying experience.

"The evaluation of a land surveyor applicant's qualifications shall involve a consideration of his education, technical and land surveying experience, exhibits of land surveying projects with which he has been associated, recommendations by references, and reviewing of these categories during an oral examination. The land surveyor applicant's qualifications may be reviewed at an interview if the Board deems it necessary. Educational credit for institute courses, correspondence courses, etc., shall be determined by the Board.

"The following shall be considered a minimum evidence satisfactory to the Board that the applicant is qualified for registration as a land surveyor or for certification as a land surveyor-in-training, respectively:

"(1) As a registered land surveyor (shall meet one):

"a. Rightful possession of a B.S. degree in surveying or other equivalent curricula, all approved by the Board and a record satisfactory to the Board of one year or more of progressive practical experience one year of which shall have been under a practicing registered land surveyor and satisfactorily passing such oral and written examination, taken in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. The applicant may elect to take the first examination (Surveying Fundamentals) immediately after obtaining the B.S. degree at the first regularly scheduled examination thereafter. Upon passing the first examination and successful completion of the experience required by this subdivision, the applicant may take the second examination (Principles and Practices of Land Surveying). An applicant who passes both examinations and completes the educational and experience requirements of this subdivision shall be granted registration as a land surveyor.

"b. Rightful possession of an associate degree in surveying technology approved by the Board and a record satisfactory to the Board of three years of progressive practical experience, two years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such written and oral examination taken in the presence of and as required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying. The applicant may elect to take the first examination (Surveying Fundamentals) immediately after obtaining the associate degree at the first regularly scheduled exami-

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nation thereafter. Upon passing the first examination and successfully completing two years of progressive practical experience under a practicing registered land surveyor, the applicant may elect to take the second examination (Principles and Practices of Land Surveying) prior to, during, or after completion of the additional experience required by this subdivision. An applicant who passes both examinations and successfully completes the educational and experience requirements of this subdivision shall be granted registration as a land surveyor.

"c. Land Surveyor-in-Training Certificate, Experience, and Examination. — A holder of a certificate of land surveyor-in-training issued by the Board, and with a specific record of an additional two years or more of progressive surveying experience, one year of which shall have been under a practicing registered land surveyor, of a grade and character which indicates to the Board that the applicant may be competent to practice land surveying, shall be admitted to two four-hour examinations. Upon passing such examinations, the applicant shall be granted a certificate of registration to practice land surveying in this State, provided he is otherwise qualified.

"d. Graduation from a high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of seven years of progressive practical experience, six years of which shall have been under a practicing registered land surveyor, and satisfactorily passing such oral and written examination written in the presence of and required by the Board, all of which shall determine and indicate that the candidate is competent to practice land surveying.

"e. Repealed by Session Laws 1985 (Reg. Sess., 1986), c. 977, s. 7.

"f. Registration by Comity or Endorsement. — A person holding a certificate of registration to engage in the practice of land surveying issued on comparable qualifications from a state, territory, or possession of the United States will be given comity considerations. However, he may be asked to take such examinations as the Board deems necessary to determine his qualifications, but in any event, he shall be required to pass a written examination of not less than four hours' duration, which shall include questions on laws, procedures, and practices pertaining to the practice of land surveying in North Carolina.

"g. A licensed professional engineer who can satisfactorily demonstrate to the Board that his formal academic training in acquiring a degree and field experience in engineering includes land surveying, to the extent necessary to reasonably qualify the applicant in the practice of land surveying, may apply for and may be granted permission to take the two four-hour examinations on the principles and practices of land surveying and the two four-hour examinations on the fundamentals of land surveying. Upon satisfactorily passing the examinations, the applicant will be granted a license to practice land surveying in the State of North Carolina.

"h. Professional Engineers in Land Surveying. — Any person presently licensed to practice professional engi-

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neering under this Chapter shall upon his application be licensed to practice land surveying, providing his written application is filed with the Board within one year next after June 19, 1975.

"The Board shall require an applicant to submit exhibits, drawings, plats or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised.

"(2) As a land surveyor-in-training (shall meet one):

"a. Rightful possession of an associate degree in surveying technology approved by the Board and satisfactorily passing a written or oral examination taken in the presence of and as required by the Board.

"b. Rightful possession of a B.S. degree in surveying or other equivalent curricula in surveying all approved by the Board and satisfactorily passing such oral and written examinations written in the presence of and required by the Board.

"c. Graduation from high school or the completion of a high school equivalency certificate and a record satisfactory to the Board of five years of progressive, practical experience, four years of which shall have been under a practicing registered land surveyor and satisfactorily passing oral and written examinations taken in the presence of and as required by the Board.

"The Board shall require an applicant to submit exhibits, drawings, plats, or other tangible evidence of land surveying work executed by him under proper supervision and which he has personally accomplished or supervised."

§ 89C-20. Rules of professional conduct.

In the interest of protecting the safety, health, and welfare of the public, the Board shall promulgate and adopt rules of professional conduct applicable to practice of engineering and land surveying. These rules, when adopted, shall be construed to be a reasonable exercise of the police power vested in the Board of Registration for Professional Engineers and Land Surveyors. Every person registered by the Board shall subscribe to and observe the adopted rules as the standard of professional conduct for the practice of engineering and land surveying. In the case of violation of the rules of professional conduct, the Board shall have the responsibility and duty to proceed in accordance with G.S. 89C-22. (1975, c. 681, s. 1; 1987, c. 827, s. 73.)

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, deleted the former third sentence, which read "The currently effective rules shall be published in the Annual Register" and deleted "and Article 3 of Chapter 150A of the General Statutes" at the end of the last sentence.

CASE NOTES

Stated in North Carolina State Bd. of Registration for Professional Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155 (E.D.N.C. 1985).

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Chapter 89D.

Landscape Contractors.

Sec.
89D-7. Denial, revocation or suspension of certificate.

§ 89D-7. Denial, revocation or suspension of certificate.

(b) Chapter 150B of the General Statutes applies to proceedings under this section to deny, revoke, or suspend a certificate. (1975, c. 741, s. 7; 1987, c. 827, s. 74.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, rewrote subsection (b).

Chapter 89E.

Geologists Licensing Act.

§ 89E-4. North Carolina Board for Licensing of Geologists; appointments; terms; composition.

(a) The North Carolina Board for Licensing of Geologists shall have the power and responsibility to administer the provisions of this Chapter in compliance with Chapter 150B of the General Statutes.

(1983 (Reg. Sess., 1984), c. 1074, s. 1; 1987, c. 827, s. 75.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment, effective August 13, 1987, substituted "Chapter 150B of the General Statutes" for "the Administrative Procedures Act, G.S. Chapter 150A" in subsection (a).

§ 89E-20. Hearing procedures.

(a) The Board shall develop procedures for investigation, prehearing and hearing of disciplinary actions; such disciplinary actions shall be conducted pursuant to the provisions of Chapter 150B of the General Statutes.

(b) Any person aggrieved by a decision of the Board other than a decision in a disciplinary action may petition the Board for a hearing pursuant to the provisions of Chapter 150B of the General Statutes.

(1983 (Reg. Sess., 1984), c. 1074, s. 1; 1987, c. 827, ss. 1, 76.)

Only Part of Section Set Out. — As the rest of the section was not affected by the amendment, it is not set out.

Effect of Amendments. — The 1987 amendment substituted "Chapter 150B" for "Chapter 150A" in subsections (a) and (b), and deleted "Article 3" preceding "Chapter 150B" in subsections (a) and (b).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1987

I, Lacy H. Thornburg, Attorney General of North Carolina, do hereby certify that the foregoing 1987 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Department of Justice of the State of North Carolina.

LACY H. THORNBURG
Attorney General of North Carolina

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